S. Hrg. 98-1037

OVERSIGHT OF THE FEDERAL ADVISORY COMMITTEE ACT

HEARING

BEFORE THE

SUBCOMMITTEE ON INFORMATION MANAGEMENT AND REGULATORY AFFAIRS

OF THE

COMMITTEE ON GOVERNMENTAL AFFAIRS UNITED STATES SENATE

NINETY-EIGHTH CONGRESS

SECOND SESSION

ON

S. 1641

TO AMEND THE FEDERAL ADVISORY COMMITTEE ACT TO ADD A NEW SECTION PROHIBITING SCIENTIFIC ADVISORY COMMITTEE MEMBERSHIP FROM BEING BASED ON THE POLITICAL AFFILIATION OF ANY CANDIDATE

AND

S. 2127

A BILL ENTITLED "FEDERAL ADVISORY COMMITTEE ACT AMENDMENTS OF 1983"

JUNE 21, 1984

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OVERSIGHT OF THE FEDERAL ADVISORY COMMITTEE ACT

THURSDAY, JUNE 21, 1984

U.S. SENATE,
SUBCOMMITTEE ON INFORMATION MANAGEMENT AND
REGULATORY AFFAIRS,
COMMITTEE ON GOVERNMENTAL AFFAIRS,
Washington, DC.

The subcommittee met, at 2:05 p.m., in room SD–342, Dirksen Senate Office Building, Hon. John C. Danforth, chairman of the subcommittee, presiding.

Present: Senators Danforth and Durenberger.

Staff present: B. Reid Detchon, staff director; and Carla J. Smart, chief clerk.

OPENING STATEMENT OF SENATOR DANFORTH

Senator DANFORTH. This is an oversight hearing on the Federal Advisory Committee Act.

I do have a short opening statement, but because of some scheduling problems, I am not going to read it, and also because we have a very distinguished guest, Senator Nickles, who has given a lot of time and attention to this issue. I am delighted to hear the Senator.

At this point in the record I will insert my prepared statement and a statement of the chairman of the full committee, Senator Roth.

[The statements follow:]

PREPARED STATEMENT OF SENATOR JOHN C. DANFORTH

This afternoon the Subcommittee on Information Management and Regulatory Affairs convenes to hold an oversight hearing on the Federal Advisory Committee Act. We will also be receiving testimony on S. 2127, introduced by Senator Nickles, and S. 1641, introduced by Senator Bumpers.

The Federal Advisory Committee Act, enacted 12 years ago, was sponsored by the late Senator Lee Metcalf of Montana, who was Chairman of the previous version of this Subcommittee. The aim of the Act was to provide a better framework for managing the many hundreds of Federal advisory committees and to make their deliberations more accessible to the public.

Last year Senator Roth and I asked the General Accounting Office to review the administration and implementation of the Act. Specifically, we wanted to know how well the General Services Administration was carrying out its management responsibilities; whether significant conflict-of-interest problems have arisen; whether agencies are giving adequate consideration to the recommendations of their advisory committees; whether we should require that meetings of advisory committee subcommittees be open to the public; and whether agencies should be discouraged from compensating advisory committee members for their services. Our GAO witnesses today will address those questions.

In addition, we will hear from Senators Nickles and Bumpers on their proposals for improving FACA; from OMB and GSA on their administration of the Act; and from two groups that have shown a sustained interest in the proper functioning of the Act, the Federal Bar Association and the Kettering Foundation.

Our first witness is Senator Nickles, the sponsor of S. 2127, the Federal Advisory Committee Act Amendments of 1983.

PREPARED STATEMENT OF SENATOR WILLIAM V. ROTH, JR.

I am pleased that Senator Danforth is holding this oversight hearing on the Federal Advisory Committee Act. This hearing, and the record that it produces, can make a substantial contribution to more effective administration of the Federal advisory committee system.

I happen to believe that advisory committees play a very important role in our representative system of government. I thought so in May of 1971 when I introduced the Federal Advisory Committee Standards Act. I thought so in the fall of that year when I testified in support of the legislation in the House before the Government Operations Committee. And I think so now, after twelve years of experience with the Federal Advisory Committee Act (FACA).

Advisory committees make available to government decisionmakers the special expertise of private citizens who might not otherwise have much governmental contact. In just the last year advisory committees made extremely valuable contributions in policy areas as diverse as social security reform, national security and improved governmental efficiency. Since advisory committees are intended to be of a temporary nature and participation is either voluntary or with minimal compensation, the committee system is a sound investment of government resources. Of equal importance, the committee system fosters the tradition of citizen participation that is one of the bulwarks of our democratic system.

On balance, I believe the twelve-year record of the Federal Advisory Committee Act is a constructive one in terms of stabilizing the system and providing guidance for the administration of the committees it encompasses. As some here may recall in the early 1970's we were faced with the continuing proliferation of advisory committees without any clear idea of how many committees existed or any comprehensive assessment of the committees' work product.

The 1972 Act substantially improved this situation in four principle ways. The legislation:

1. Created a chartering process for determining whether new committees should be created and, on a two-year cycle, whether existing committees should remain in existence;

2. Mandated an annual report including a committee inventory and a description of the activities and status of committees during the previous year;

3. Established guidelines for the administration of Federal advisory committees; and

4. Provided for public access to the report on committees' activities, findings and recommendations.

In short, the Advisory Committee Act established a flexible management system where management had been totally lacking and established clear administrative guidance where there had existed the opportunity for special interest abuse of the system.

Yet despite the positive FACA record, problems clearly do remain with the Act. The Twelfth Annual Report of the President on Federal Advisory Committees issued just yesterday contains data indicating that a number of Committees held no meetings in the last year, yet they expended substantial amounts of public funds. The report also cites numerous committees that reported no substantial contribution in terms of recommendations or advice in the last year. If this proves to be a continuing pattern, such committees are prime candidates for termination at the end of the two-year cycle. An important issue to explore in this hearing is whether or not the two-year rechartering process is ensuring that committees are disbanded once they complete their work or simply fall inactive.

Other groups interested in an effective advisory committee system have raised issues that merit our attention here today. The 1982 report of the Kettering Foundation explores the issues of paperwork burden for committees, and legal restrictions on one time only meetings that impede effective use of advisory groups.

The Kettering report also addresses the important concern that state and local elected and responsible appointed officials are included in the requirement of the FACA legislation. These officials have a special relationship with the Federal government in the development and administration of intergovernmental programs. These state and local officers, I believe, should be permitted to meet with federal government officials to present their views on federal policy, without having to comply with the FACA requirements.

Each of these issues must be addressed if the integrity of the advisory committee is to be preserved and the committees are to realize their full potential as a valuable private sector resource. The hearing today is an important part of the congressional oversight process and should provide important insight into administrative and possibly legislative steps that may be needed to ensure effective administration of the advisory committee system.

I am pleased that the Subcommittee is examining this issue and I eagerly look forward to the completed hearing record.

TESTIMONY OF HON. DON NICKLES, U.S. SENATOR FROM THE STATE OF OKLAHOMA

Senator NICKLES. Thank you very much, Mr. Chairman. I appreciate your scheduling this hearing on my bill, S. 2127, the Federal Advisory Committee Act Amendments of 1984, especially in light of the hectic Senate schedule that we have had all week, in late last night, and also knowing that you are involved in the tax conference. I know that your time is limited.

Mr. Chairman, Federal advisory committees have been around since our Republic was founded. One of them, the Board of Tea Experts, was created in 1897; it still operates today. These committees provide Federal agencies with broad policy advice on national issues, develop special technical recommendations, and review grant requests. Last year more than 21,000 people served as advisory committee members.

There were a total of 973 Federal advisory committees last year which cost taxpayers more than $75 million. As these numbers indicate, the Federal advisory committee system has grown into a very large bureacracy itself, complete with large budgets, staffs, full-time committee managers, and an extraordinary amount of power.

My staff and I have been conducting a yearlong analysis of these publicly funded committees. I have concluded that a great number of them are totally unnecessary, are too costly, and are keeping the general public out of the government decisionmaking process.

Consider these facts:

Mr. Chairman, last year 136 committees did not meet. That is better than the previous year when we had 194 committees that did not meet. Yet these committees cost the taxpayers $660,000 to operate.

Some committees, Mr. Chairman, cost taxpayers over $100,000 per member to operate. Quite frankly, if it costs over $100,000 per member to operate, you could hire the individuals and have them work year-round instead of having them drop in on Washington, DC, on a few occasions. That may be an exception, but you will find that there are a lot of others that cost large amounts as well. Certainly this is abuse of taxpayers' funds.

We find that the President's Committee on Medical Ethics met one time last year. They have 11 members. The cost altogether was $611,000. That is $55,000 per member.

We had the Motor Carrier Ratemaking Study Commission. They met last year. The committee cost taxpayers $1 million. The cost per

committee member is $67,000. The cost per meeting was $217,000. This is just to highlight a few examples.

The Commission on Fine Arts met one time last year. The cost of this committee was $328,000. It has seven members. The cost per committee member was $46,000. These are enormous expenses.

Mr. Chairman, another point to consider is nearly half of the advisory committee meetings last year were closed to the public, many I think in violation of the open meeting laws.

I make some of these comments, Mr. Chairman, to bring it to your attention, to the attention of the administration, and to try to see if we can't make some progress. Some progress has been made. Some committees have been eliminated, but I think we have a lot further to go.

I introduced this legislation to try and help the administration achieve those goals of reforming the Government. I think some progress has been made, but I really believe that much is yet to be done.

I mentioned that $5.5 million was paid out to more than 7,100 advisory board members last year. Many are paid at a rate of up to $250 a day, in addition to travel and per diem, which usually is $75 per day; and travel, of course, depends on from where they come. We find that a large proportion of certain agencies make it the standard practice to compensate their members.

First, Mr. Chairman, I want to thank GSA for the fine work they have done in compiling a report, particularly the 12th annual report to the President. We have been working with that agency for the last year and they have been most helpful. They have done an outstanding job. I hope that Congress will look at the work they have done and the work of the various authorizing and budget committees to see if we can't make some changes.

We found in compensating members that a large number of committees make it standard practice to compensate everyone. I think that is ridiculous. I think by and large the majority of these members would be more than willing to donate their time to try and assist their country, to assist in making some changes.

We find that a very large number of agencies follow this practice. The National Science Foundation has 708 compensated members which is 92 percent of their membership. We find that on the President's Commission on Medical Ethics, 100 percent of the members are compensated as well. On the Advisory Committee on Federal Pay, interestingly enough, 100 percent of the members receive compensation for their meetings. That is, compensation above and beyond travel and per diem.

Look at the Federal Savings and Loan Advisory Council. That is a group of 24 outstanding individuals who advise the Federal Home Loan Bank Board. Last year they were paid $52,000 for three meetings that they held. That is more than $2,000 for each board member. Yet, according to the committee's 1983 report, each board member's average compensation was over $200,000.

I just find it hard to believe that individuals receiving compensation in the private sector, and they are to be commended for that—I don't fault them for that in anyway—but I don't really think the taxpayers should have to pay them $2,000 or more on top of that to serve on a board. My guess is that, if requested, the majority of those members would be glad to donate their time and services to be on that board.

This example is not unique. Most advisory committee members are in many cases the best in their respective fields. They are doctors and lawyers, scientists, scholars, public officials, and many other well-paid and prestigious individuals who don't need the extra money and, in my opinion, would be willing to serve, if requested, without being compensated by the Federal Government.

Some agencies make the comment that they can't recruit good advisors unless they pay top dollar. Yet we have been unable to find a single agency, which pays all of its advisory board members, that has made an honest effort to find volunteers. They have literally taken it for granted that volunteers can't be found or volunteers are somehow undesirable. My bill would make compensation, above per diem and travel allowances, the exception rather than the rule.

Another important question that needs to be answered is whether these advisory committees are actually useful. Many are, but I would imagine, Mr. Chairman, a large percentage has very questionable value.

I received a letter from a constituent in Oklahoma who served 8 years on an advisory committee that appeared to be doing important work. Mr. Chairman, I will just paraphrase his letter, I ask that it be included in my statement in full.

Just to highlight some of his comments, he said:

> In past years I was a member of the Public Advisory Committee of the State Department for the Task Force Law of the Sea negotiations at the U.N. The Task Force was made up of experts from four or five fields. We met as subcommittee groups and also as a committee of the whole. In the 8 years that I served on the committee, numerous times I complained about their operating methods. Experts on the committee were called to meetings, to be told what the staff and the ambassador had done since the last U.N. meeting and what his plans were before the next U.N. meeting.
>
> There was a lot of conversation at these advisory group meetings, however, very little of the input by the experts was used.

Further down, he says:

> There is no reason for advisory groups to hire consultants. Each member serving on an advisory group is supposed to be an expert in his field, or otherwise he would not have been chosen. Nine times out of ten the individuals serving on the advisory committee know much more about the subject than most of the consultants hired by the bureaucrats.

I will include this in the record.[1]

Unfortunately, this letter is not an exception but I believe an example of the real purpose of many advisory committees. That is, just a nice little political plum for an important constituent back home.

Mr. Chairman, you might ask yourself when is the last time you have heard of some of these advisory committees. Many would be surprised to find there has been an advisory committee called the Gospel-Hump Area Advisory Committee. I hope it is not based in Missouri. [Laughter.] There is the Committee of Nine.

We looked at the Committee of Nine. We found out it is not only a committee of 9, but it is actually a committee of 12. We looked at their purposes. Last year they cost $27,000. The Committee of Nine is under the Department of Agriculture. It cost $27,000 last year and they had three meetings. There are 12 members. They probably will have to amend their name. [Laughter.] Next year their estimated costs are $28,000.

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[1] See p. 9.

Looking at their meeting, this is interesting. The committee states the significance for their meeting is to review the procedure for allocation of funds to the interregional projects and consider travel costs of administrative advisors to attend the meetings. That is kind of interesting. We might abolish that committee and save $27,000 and they wouldn't have to change their name. If they change their name, they may cost several thousand more dollars.

We find the New Directions Advisory Committee; the Life Course Review Committee; Aquaculture Advisory Board; the Rangeland Research Advisory Board; Ice Age National Scenic Trail Advisory Council—that is interesting—and then the Federal Graphics Evaluation Advisory Council.

The Board of Tea Experts, that is really a dandy. They spent $5,000 last year to do not much more than to sip tea for a day. The committee has existed for 100 years and it consists of senior tea company executives from the east coast. I later discovered that the Food and Drug Administration employs two full-time tea experts, another questionable expense as well: a GS–13 in New York and a GS–12 in New Orleans.

The obvious question is why do we need this Federal Board of Tea Experts?

The list of innocuous advisory boards is a lot longer than I have just read. As I mentioned, there are 970-some advisory boards or committees that are in operation today. I don't want to take all of your time. I believe a great many of them duplicate their work. There are over 80 advisory committees that deal with grazing, interestingly enough. There are more than six committees dealing with drug abuse or with nutrition, five with meat and poultry, and more than a dozen dealing with fish. Here again, unless there is more oversight—and I congratulate you for having this oversight—certainly we are wasting taxpayers' dollars.

One reason that most of the public at large is unaware of all but a handful of these advisory committee meetings is because a great percentage of their meetings were closed to the public. It seems ironic to me that a system of citizen advisory groups designed to open the governmental process to people allows 45 percent of its meetings to be held in secret.

My legislation would require stricter adherence to the open meeting laws.

The routine practice of advisory committees hiring consultants should be appalling to anyone who examines the situation. Advisory committee members themselves are supposed to be consultants. So under the present system, you have consultants hiring consultants, all at public expense.

Mr. Chairman, some committees paid over $1 million for consultants last year. Taxpayers spend millions of dollars not only to pay advisory committee members, but also additional consultants. In my opinion, that is absurd.

Mr. Chairman, although the total cost of advisory committees was only $75.5 million, their power is much more far-reaching than that figure indicates. While none of the committees have the legal authority to issue grants, their recommendations to spend money are, in practice, tacit authority. No study has been made of how much money

these advisory groups actually control, but my cursory analysis finds it to be in the billions of dollars. Here again this is why much more extensive oversight is needed. The legislation which I have introduced is not a broad-brush approach. It deals with specific problems. I am not saying it is totally correct and I am open for suggestions if we can make some improvements. But I am committed to the premises. We do have too many advisory committees. We do have too many people taking money away from the Federal Government, receiving compensation in the form of direct compensation, per diem, travel expenses, charging the taxpayers for these meetings, a large number of which have very little, if any, value to government.

I appreciate, Mr. Chairman, your cooperation in scheduling this hearing to let us point out some of these things. I am hopeful that we will be able to utilize this meeting and possibly some others to put some pressure on the administration and the various agency heads to eliminate some of these types of situations.

To give you an example, Mr. Chairman, here is one from last year: the Department of Labor Federal Committee on Apprenticeship. They did not meet, had zero meetings. They still charged the taxpayers $5,500. Next year they are going to eliminate that problem. They are going to meet, and it is going to cost the taxpayers $69,000. Not a very good solution.

This committee, Mr. Chairman, the U.S. Department of Justice, Bureau of Justice Statistics Advisory Board, met twice last year. They spent $45,000. Next year they expect to spend $52,000. If you look at their justification of what they did, they said their first two meetings were basically spent in educating members about this advisory board, which again doesn't seem to make a lot of sense.

Mr. Chairman, I have many examples. I know you are busy, and we have legislation on the floor that is important to our State as well, the water bill, that I need to be on the floor for. I appreciate your time and your cooperation in scheduling this hearing and hopefully, with your leadership and our watching some of these committees and some of the bureaucracy, we will be able to make some significant reforms. Thank you very much.

Senator DANFORTH. Senator Nickles, thank you very much for your very helpful testimony.

I take it you don't necessarily agree with the old adage that advice is worth what you pay for it.

Senator NICKLES. Well, we have paid way too much for a lot of the advice that we get.

Mr. Chairman, I will add a caveat to that. I have attended some of the advisory board meetings. I have, like you have, and I am sure every Senator has, been appointed or had some constitutents appointed to some of these boards. Some of them make a positive contribution. But I would still say probably a very significant percentage, if not a majority, make very little contribution to our Government.

Senator DANFORTH. Thank you very much. We will look at your bill with great interest.

Senator NICKLES. Thank you very much.

Senator DANFORTH. We appreciate your being here.

[Senator Nickles' prepared statement and the letter referred to follow:]

PREPARED STATEMENT OF SENATOR DON NICKLES

Mr. Chairman, I want to thank you for scheduling this hearing on my bill, S. 2127, the Federal Advisory Committee Act Amendments of 1984.

Federal advisory committees have been around since our Republic was founded, and one of them—the Board of Tea Experts—created in 1897, still operates today. These committees provide federal agencies with broad policy advice on national issues, develop special technical recommendations, and review grant requests. Last year, more than 21,000 people served as advisory committee members.

There were a total of 973 federal advisory committees last year which cost taxpayers more than $75 million. As these numbers indicate, the federal advisory committee system has grown into a large bureaucracy itself, complete with large budgets, staffs, full-time committee managers, and an extraordinary amount of power.

After conducting a year-long analysis of these publicly financed committees, I've concluded that a great number of them are not necessary, are too costly, and are keeping the general public out of the government decision-making process.

Consider the following facts:

Last year, 136 committees did not meet, yet cost nearly $660,000 to operate. This is an improvement from 1982 when 194 committees had no meetings and cost $1.25 million;

Some committees cost more than $100,000 per member to operate;

Millions of dollars were spent by advisory committees to hire consultants, which is particularly ironic considering advisory committees themselves are supposed to be consultant boards;

Nearly half the advisory meetings held last year were closed to the public.

Armed with these statistics and many specific examples of waste, the General Services Administration proposed regulatory changes last year to make the advisory committee system more accountable. The interim rules, approved by OMB, were right in line with President Reagan's call for efficient government management, and his often-stated goals for more voluntarism.

Despite President Reagan's policy initiatives on government waste and voluntarism, the regulatory proposals got a chilly reception in the bureaucracy and I introduced S.2127 to help the Administration achieve its policy goals. Unfortunately, we continue to run into roadblocks, and so I thank the distinguished chairman of this subcommittee for taking the time to examine the situation.

Let me detail a few of the problems we have found. $5.5 million was paid to more than 7,100 advisory board members last year. Many are paid at a rate of up to $250 a day, and this is in addition to the travel and per diem allowances they receive.

This is not to say that advisors do not deserve to be paid, quite the contrary. Most of them are very talented people with highly marketable skills and knowledge. But the fundamental issue is whether certain federal agencies should hire consultants—which is what advisory boards actually are—or should they seek talented Americans willing to serve their country as volunteers.

Consider the Federal Savings and Loan Advisory Council, a group of 24 outstanding individuals who advise the Federal Home Loan Bank Board. Last year they were paid a total of $52,000 for three meetings they held—more than $2,000 for each board member. Yet, according to the committee's 1983 report, each board member earns an average of $200,000 a year in salary, and I doubt whether any of them counts on his $2,000 advisory committee fee to pay the rent. It is very likely that if they were asked to serve voluntarily they would be happy to do so.

This example is not unique. Most advisory committee members are among the best in their respective fields. They include doctors, lawyers, scientists, scholars, public officials, and many other well-paid and prestigious individuals who don't need the extra money and would be willing to serve voluntarily, if asked. I believe that in a nation of 230 million people there are many who are eminently qualified and would donate their expertise to serve on a federal advisory committee.

Some agencies claim they can't recruit good advisors unless they pay top dollar. Yet, we have been unable to find a single agency that pays all of its advisory board members that has made an honest effort to find volunteers. They have literally taken it for granted that volunteers can't be found, or that volunteers are somehow undesirable. My bill would make compensation, above per diem and travel allowances, the exception rather than the rule.

Another important question is whether these advisory committees are actually useful. Many are, but some have questionable value. I received a letter from a constituent of mine recently who served eight years on an advisory committee that appeared to be doing important work.

Unfortunately, this letter is not an exception, but an example of the real purpose of many advisory committees, and that is just a nice political plum for an important constituent back home. When was the last time you heard of these advisory committees:

Gospel-Hump Area Advisory Committee, Committee of Nine, New Directions Advisory Committee, Life Course Review Committee, Aquaculture Advisory Board, Rangeland Research Advisory Board, Ice Age National Scenic Trail Advisory Council, Federal Graphics Evaluation Advisory Council.

The Board of Tea Experts—now here's an interesting one. It spent $5,000 last year to do not much more than sip tea for a day. This committee has existed for almost one hundred years and consists of senior tea company executives from the East Coast. I later discovered that the Food and Drug Administration employs two full-time tea experts: a GS–13 in New York and a GS–12 in New Orleans. The obvious question is why do we need a hundred-year-old tea board at all?

Well, the list of innocuous advisory boards is much longer than what I have just read. But the point is that unless there is some responsible oversight, no one will know whether these committees are worth the money taxpayers spend.

In fact, there are so many advisory boards that I am certain some of their work is being duplicated. There are more than 80 advisory committees that deal with "grazing." There are six committees dealing with "drug abuse." Four concern "nutrition." Five "meat and poultry." And more than a dozen dealing with fish. Here again, unless there is more oversight, we will never know if we are wasting tax dollars on duplicated effort.

One reason that most of the public-at-large is unaware of all but a handful of these committees is that almost half of all advisory meetings held last year were closed to the public. It seems ironic that a system of citizen advisory groups designed to open up the governmental process to the people allows 45 percent of the meetings to be held in secret.

My legislation would require stricter adherence to open meeting laws.

The routine practice of advisory committees hiring consultants should be appalling to anyone who examines the situation. Advisory committee members themselves are supposed to be consultants. So, under the present system you have consultants hiring consultants, all at public expense. Taxpayers spend millions of dollars not only to pay advisory committee members but also additional consultants. This is absurd. Why not ask the paid consultant to join the advisory committee and save the taxpayers' money?

Mr. Chairman, although the total cost of federal advisory committees was $75.5 million last year, their power is much more far reaching than that figure indicates. While none of the committees have the legal authority to issue grants, their recommendations to spend money are, in practice, tacit authority. No study has been made of how much money these advisory groups actually control, but by cursory analysis finds it to be in the billions of dollars. Here again, this is why more extensive oversight is needed.

S. 2127 is not a broad-brush approach; it deals with specific problems. I'm not saying it is perfect legislation, rather, it is merely a vehicle from which to work. I am certainly not wedded to its details, rather to its principles. Some will come before this committee today to defend the system and criticize the bill, but I would like to ask them whether they have taken the time to read every committee management report, interview committee managers and board members, and thoroughly analyze GSA's regulatory proposals. Such a thorough examination will lead one to believe that the system must be reformed.

OKLAHOMA CITY, OK, *March 20, 1984.*

Senator DON NICKLES,
Dirksen Senate Office Building,
Washington, DC.

DEAR SENATOR: I want to congratulate you upon your attempt to reform the present operating procedures of the public advisory committee groups.

In past years I was a member of the Public Advisory Committee of the State Department for the Task Force Law of the Sea negotiations at the U.N. The

Task Force was made up of experts from four or five fields. We met as subcommittee groups and also as a committee of the whole. In the eight years that I served on the committee, numerous times I complained about their operating methods. Experts on the committee were called to meetings, to be told what the staff and the ambassador had done since the last U.N. meeting, and what his plans were to do before the next U.N. meeting.

There was a lot of conversation at these advisory group meetings, however, very little of the input by the experts were used. It appeared that Mr. Richardson and his predecessors had already made up their mind as to what they were going to do, and would use us as a rubber stamp for their actions. Many times they would start off their conversations with "We have reviewed this proposal with industry and other interested parties . . ." and then proceed to tell the United Nations delegation what they and their staff wanted to do. Industry representatives and the experts on the advisory committees were unable to correct the position submitted by the State Department delegation.

There is no question for advisory groups to hire consultants. Each member serving on an advisory group is supposed to be an expert in his field, or otherwise he would not have been chosen. Nine times out of ten, the individuals serving on the advisory committee know much more about the subject than most of the consultants hired by the bureaucrats.

Good luck on your proposed legislation. If I can be of assistance, please let me know.

Sincerely,

T.S. ARY.

Senator DANFORTH. The next witness is Senator Bumpers.

Senator Bumpers, we are delighted to have you here. We will receive your advice on the advisory committees.

TESTIMONY OF HON. DALE BUMPERS, U.S. SENATOR FROM THE STATE OF ARKANSAS

Senator BUMPERS. Mr. Chairman, I want to first thank you for holding these hearings just one floor above my office. It makes it awfully handy.

Senator DANFORTH. Glad to be helpful. [Laughter.]

Senator BUMPERS. I want you to know that I really am pleased to testify here today at this oversight hearing on the Federal Advisory Committee Act. I know that the subcommittee is primarily interested in the issue of compensating the committee members, but I couldn't pass up this opportunity to draw to the committee's attention a matter which I think is very important and closely related to the compensation issue. That is the question of political clearance of candidates for scientific advisory committees. Please note I am saying scientific advisory committees and not all advisory committees.

Last year I introduced S. 1641, the Nonpartisan Scientific Advisory Committee Act. I did so in response to reports that the Department of the Interior and other agencies had subjected candidates to political screening and clearance. I was astonished to hear of this practice, especially since it had become so routine and systematic.

I obtained a memorandum to the Republican National Committee written by a Special Assistant to Secretary James Watt. It was simply a list of persons who were candidates for various advisory committee positions. Next to each name on the list was a handwritten "yes" or "no." Each person with a "yes" next to his or her name was appointed; those with a "no" beside their name were not.

It was clear to me, and I am sure that it was clear to anyone who saw the memo, that the Department of Interior was routinely seeking political clearance from the Republican National Committee before ap-

pointing respected scientists to advisory committees, such as in this instance, a committee to advise the Secretary on the environmental effects of offshore leasing. Nobody would think that the environment had any partisan preference.

Unfortunately, this pattern has been repeated in other agencies of the Government. It is pervasive and it is dangerous. In fact, Chairman Fahrenkopf has admitted to a Washington Post reporter that the Republican National Committee routinely checked candidates for advisory boards in all but three Federal Departments: State, Justice, and Defense. If the practice isn't stopped, these committees will at least be tainted and could become worthless.

Some people may recall the sad example of Trofim Denisovich Lysenko, a Soviet geneticist. He developed his own politically convenient theory of plant breeding and convinced Stalin to decree that this theory was correct. Those who disagreed were dismissed or exiled. As a result, Soviet science became heavily politicized and scientific progress stunted. We should learn from history that science should be free from political litmus tests.

In order to confirm reports I heard, I asked the Department, under the Freedom of Information Act, to provide any memoranda or other communications showing whether the Department was seeking clearance from the RNC. I specifically described the memo which I already had in my hand, and the Department denied having it. Eventually, it provided 1,336 pages of documents showing that the Republican National Committee routinely and systematically screened candidates for most advisory committees. The Department even provided biweekly status reports to the RNC. Those documents also showed that the Department commonly used the checkoff format which had been used on the memo I had obtained from other sources.

When this information came to light, Secretary Watt admitted it. On a national news show, and I happened to be watching—and this was live—he said:

> Generally, we have sought to bring massive change to the Department of Interior, and I no longer want the dozens and dozens of advisory committees to give me the kind of advice they gave to Mondale and Carter * * * I don't want that kind of advice, so I gave generally to my folks—well, let's clean up the advisory groups. Let's get good advisors that want us to be successful * * * and I would hope that we would check with the Republican National Committee * * *.

Now this statement reveals the very real threat of Lysenkoism: If you don't like the advice, get new advisors. It completely perverts the reason for such committees and turns them into impotent yes-men, giving only scientific advice that enhances a political party or President.

In addition, the Secretary's statement only acknowledges checking with the RNC, as if that was part of a broader attempt to collect as much information as possible about the candidates. But the Department was doing more than that. It was giving the RNC a veto, which is far worse.

For a while officials at the Department defended the procedure. During the confirmation of Mr. Perry Pendley to be Assistant Secretary of the Interior for Energy and Minerals, I asked him if he would discontinue this practice. Rather than assure me that he would, he said, a little circuitously, that the old practice would continue, and I quote his response: "As in the past, views as to those appointments will be received from a number of diverse entities."

Now a simple "yes" is all the question needed, but the response amounted to saying the same thing that Secretary Watt said, that the checking with the RNC would continue.

During his confirmation hearings, Secretary of the Interior William Clark assured me that he would look into the situation. He now assures me that candidates are no longer subject to political clearance. I am pleased to hear that. And I must say that Secretary Clark has been most cooperative with all of my concerns. But that doesn't end the need for curative legislation. Any new Secretary, Democratic or Republican, could reinstitute the old practice unless legislation is passed to prohibit it.

This legislation is indispensable to the question of compensation because no amount will attract the best scientists if the scientific advisory boards are themselves perverted. Appointment to these boards is desirable primarily because of the prestige involved. This prestige, which attracts the best minds, would evaporate if they are subjected to a political litmus test, or if they are to be condemned and removed for giving unwelcome advice. A highly desirable process would be reduced to a pointless charade, and only puppets would participate. We should not compensate puppets.

We have a greater duty, however, and that is to defend these valuable advisory boards and committees. We must make sure that they are composed of the best scientists, regardless of who appoints them. This must not be a partisan issue. The committees must be nonpartisan or their members certainly will not be worthy of compensation.

I urge this subcommittee to consider this issue and remove all political clearances as a necessary predicate to deciding the compensation issue.

Senator DANFORTH. Let's suppose that there is one post open on an advisory committee and there are two highly esteemed scientists who have expertise in the area and one is a Democrat and one is a Republican. Should a Republican President be able to consider the partisanship of the two possible selections or should he just be absolutely blind to party and pull their names out of a hat?

Senator BUMPERS. I am inclined to think that on scientific advisory committees he ought to be blind, because if you say in this case—and it is a very good question—that the President certainly ought to have the right to pick the Republican between the two who are equally qualified, then you get into the nuances of how well qualified is one person against another. It just opens the door to the very abuse that I am here to protest.

The President, if he is appointing people to advisory committees, should be looking for pure scientific fact. That, of course, crosses political boundary lines. If the President has personal knowledge that there is a Republican and their is a Democrat, either of whom would be equally acceptable, if he knows that, he would be foolish not to appoint the Republican.

Normally, scientists are not that involved in the political process. Sometimes they are. I know the Union of Concerned Scientists has very strong feelings about the nuclear issue. Incidentally, I don't know if that makes them Democratic as opposed to Republican. But what I am saying is if the President says, "Look, we have two people here now, each of whom seems to be equally well qualified for this position, go out and find out if either one of them is a Republican so I can be

sure and appoint the right one," if you don't prohibit that, then the President, of course, is going to conclude perhaps that maybe these two people are not quite equal; one is slightly better than the other one. So I would say no, the President ought not do that, Mr. Chairman.

Senator DANFORTH. Let's suppose that there is an appointment to a committee dealing with environmental matters and that there are two eminently qualified scientists who are being considered. One of them is a well-known environmentalist, a member of various environmental groups, a person who has written on environmental subjects, testified before congressional committees, participated in political campaigns because of environmental concerns with the campaign. The other scientist is a person who has been employed by a chemical company and has shown much less interest in environmental politics. Should the President be able to consider that kind of political matter or is it just the partisanship that shouldn't be considered?

Senator BUMPERS. I think the President ought to use his best judgment in appointing somebody, depending on what the qualifications are and what kind of person the position dictates be appointed. I am not one who has felt, for example, in the example you gave, that somebody ought to be disqualified simply because he is affiliated with the industry. Oftentimes it is desirable to pick somebody from the industry because they really have a certain expertise that is not available to people who have not been similarly situated. But in that case I think the President ought to use his best judgment. I don't think he ought to pick somebody from the industry simply because he is offended by some of the environmental groups and their antipathy toward his Presidency.

We have a tendency to look at this right now in terms of President Reagan being President and the environmentalists not being very rhapsodic about his Presidency. What we ought to do is look way beyond that because I am not here as a partisan on this issue. It happened to come to my attention during President Reagan's Presidency, but it was James Watt who was the culprit in this instance, not the President. Obviously, Secretary Watt was making these appointments.

Senator DANFORTH. But my own guess is that there is probably a spectrum of reasonableness in considering philosophical or political positions. If all you are doing is trying to find hacks who go out and ring doorbells for you on election day, that is one thing. On the other hand, I think there probably are some areas dealing with science and health, environmental matters, matters such as genetics, for example, that there are really philosophical differences in addition to scientific expertise that are involved.

You may have a President who has one particular philosophical bent and he might want to appoint somebody as an adviser in his administration who shares the same philosophical bent.

Senator BUMPERS. Mr. Chairman, I think the President is always going to have to make certain choices in all of these examples. For example, if you were going to appoint somebody to an advisory committee to the National Cancer Institute, who was going to make recommendations as to which universities should receive grants to deal with a particular kind of lymphoma, there can be absolutely no room for political partisanship there because this is a decision purely, in

my opinion, about how are we going to conquer this kind of lymphoma.

On the other hand, when you get on the environmental issues people do have a particular bent. I remember one time Hubert Humphrey and I were just sort of by default holding all of the hearings and virtually marking up the National Forest Management Act. Hubert said to me one day, "Dale, it is going to be for commonsensical people like you and me to draft this law. If the environmentalists had their way, there would never be a leaf allowed to fall, and if the timber industry had their way, they would cut every tree they could find. It is up to you and me to find the middle ground."

So in those environmental cases I think that obviously the President might have a particular bent with an eye toward the next election, but if you are talking about our Continental Shelf drilling, you are talking about the state of the art in drilling and the likelihood of coastal damage, for example, and I can't see any reason for the President to be appointing somebody to such a committee that has attended all of the last 10 Republican fundraisers.

Senator DANFORTH. I appreciate your point of view. I think that it is a pretty good point of view. If you turn out to be Vice President, can I send you a bunch of names to consider? [Laughter.]

Senator BUMPERS. If it is a well-balanced list, I certainly will. [Laughter.]

Senator DANFORTH. Thank you very much, Senator Bumpers.

Senator BUMPERS. Thank you very much, Mr. Chairman.

Senator DANFORTH. Next we have Mr. Joseph Wright, Deputy Director of the Office of Management and Budget.

Joe, thank you very much. Let me just say one thing. I have, unfortunately, a meeting in Senator Baker's office which I absolutely must attend. I am going to have to leave here at about roughly 5 to 3, or a little bit before 5 to 3 to get over there by 3 o'clock. I am not quite sure how I am going to handle the hearing. I am trying to find another Senator to sit in for me, or we might have a little recess. But I am delighted that you are here.

TESTIMONY OF JOSEPH R. WRIGHT, JR., DEPUTY DIRECTOR, OFFICE OF MANAGEMENT AND BUDGET, ACCOMPANIED BY ROBERT P. BEDELL, DEPUTY ADMINISTRATOR, OFFICE OF INFORMATION AND REGULATORY AFFAIRS, OMB

Mr. WRIGHT. Thank you very much, Mr. Chairman. I will help out in that regard by taking my 15-page testimony and putting it in the record, with your permission, sir.

Senator DANFORTH. Fine. Thank you.

Mr. WRIGHT. What I would like to do is just briefly summarize it, and I will emphasize brevity, and then try to answer whatever questions you may have on the Federal Advisory Committee Act, which was enacted in 1972, as you know. It has been in existence for about 12 years. From our standpoint, all evidence shows that it has accomplished many of its intended goals.

The 12th Annual Federal Advisory Committee Report to the President for fiscal 1983 shows that for that year we ended up with 884 advisory committees, which is up slightly from fiscal 1982, when there

were 878. The agencies are proposing that for this fiscal year 857 be continued.

There was an 11-percent increase in the number of meetings. Since President Reagan took office in 1981, there has been a 13-percent decline in the overall cost of advisory committees, from $87 million in fiscal 1980 to $76 million in fiscal 1983.

Mr. Chairman, those are nominal dollars. I didn't even adjust for inflation.

In 1983, costs per meeting declined from $22,000 to $20,000. The cost per committee declined from $78,200 to $78,000. So it is one of the few areas where we are having declining costs in the Federal Government.

In 1983, also the compensation for non-Federal members of these committees amounted to $5.5 million, which was about 7 percent of the total cost of advisory committees. Eighty percent of the compensated members served on committees from four agencies: HHS, National Endowment for the Humanities, National Science Foundation, the National Endowment for the Arts. Forty-two percent of all committee members came from professional and private enterprises.

The occupational distribution tended to be agency and program specific. Of course, metropolitan Washington, DC, had the highest number of committee members.

Now, there have been a number of efforts to fine-tune the administrative procedures of the act over the years. With the exception of Public Law 94–409, which is the Government in Sunshine Act, none have been enacted probably because there was no serious evidence that such amendments on the administrative side were needed. There are areas, though, that we believe need clarification.

The first and one of the most important is the definition of an advisory committee. Mr. Chairman, the wording is exceptionally broad, potentially bringing within the scope of the act thousands of informal meetings and even telephone calls. A better interpretation of the act entails coverage of only committees established by formal action or, as the Administrative Conference of the United States suggests, affirmatively supported and utilized by the Government through institutional arrangements which amount to the adoption of the group as a preferred source of advice.

Another area that needs to be clarified is the requirement for a balanced membership. What does it mean and really what does it apply to?

Next, what is a meeting of an advisory committee, that brings it within the scope of the act? In other words, what is the interpretation of what a meeting is?

Next, when are subcommittees required to act like and be treated the same as the parent committees?

Finally, are Members of Congress Federal employees for purposes of the act? If they are not, their presence on a committee would subject the meetings of that committee to the provisions of the act.

Now, on the issue of compensating committee members, we fully agree on the general philosophy of volunteerism, and we feel that it makes sense that most committee members should be able and willing to come and serve their Government. However, a policy that precludes compensation could hinder our ability to obtain the views of those who are part of the Government or simply who can't afford to participate.

We don't want to make it very tough to compensate those particular members and basically limit the access of the Federal Government to their advice. That could be a mistake.

There was a report that came out in June 1983 by the Charles F. Kettering Foundation called "The Utilization and Management of Federal Advisory Committees." I will finish up, Mr. Chairman, with just a very brief quote from that report. "Federal agencies and departments can do a far better job of managing and utilizing advisory committees. The prime responsibility, however, must rest with each individual agency to determine its own needs, to develop a clear charter and mission for each advisory committee, to seek out highly qualified individuals to serve on committee," et cetera.

They go on: "Is it worth undertaking the effort. Advisory committees are an essential part of American Government. Not only do they provide Government officials with guidance and advice, usually at a fraction of what private consultants would cost, but they do so with a geographic and professional diversity that no private organization can match. Equally as important"—and I would like to place my own emphasis on this, Mr. Chairman—"advisory committees provide the opportunity for large numbers of citizens to participate actively in the decisionmaking process of Government."

Mr. Chairman, I would like to close by saying in general I agree with the Senator from my native State of Oklahoma that voluntarism should be the general underlying principle of advisory committees. But I also do not believe that it should be a hard-and-fast rule or should be one that is so difficult to overcome that we do limit access to those people who do want to come in and play an important role in advising the Federal Government.

We will be very happy to work with the committee to develop whatever language is necessary to clarify those provisions of the act I cited earlier. We think clarification is necessary; it is overdue. We do not believe, however, that legislation is necessary to change the administrative aspects of the act.

Senator DANFORTH. You do not believe legislation is necessary?

Mr. WRIGHT. Not to change the administration provisions of the act. For some clarification on definitions, we may want to go into legislation.

Senator DANFORTH. For example, the point that was raised by Senator Nickles, with respect to either abolishing some of these committees that aren't necessary or dealing with the compensation question, you testified clearly on that, you don't want to be tied down on compensation, but with respect to restricting the number of committees, somehow you don't think that any legislation is necessary on that.

Mr. WRIGHT. OK, now you bring up an interesting point. About half of all of the committees I believe are directed by law. We would be more than happy to work with the committee on some type of omnibus legislation to get rid of those that are outdated, outmoded, that are not meeting, that are not fulfilling the original purpose. I believe legislation in that area could be very useful.

Senator DANFORTH. All right. We will be talking with you about that.

How about the point that Senator Bumpers made with respect to scientists who are members of committees and the desirability of not having partisanship weigh into the appointments? Did he make a good point in your view? Should that be corrected by legislation?

Mr. WRIGHT. Mr. Chairman, I do not believe legislation is required. Let me explain why.

I think some of the questioning that you were pursuing was a good line of questioning, because I am not so sure where you draw the line on what partisanship is any more. I am not so sure it is Republican-Democrat, particularly if you see how some of the votes are going. But I would say Conservative-Liberal makes more sense, corporate versus environmental groups. And we have a requirement in there right now for balanced membership. I believe that requirement has to be defined a little bit better. But, I don't know where you would stop the line of saying you can't even check whether advisory committees members are Republican or Democrat, or whether they are corporate or consumer. I don't know where you would stop.

So I think the answer is to define what balanced membership is a little bit better and not try and go and hit one specific area and say the President regardless of party cannot even consider the affiliation of members.

Senator DANFORTH. Joe, thank you very much. I have some additional questions which I am going to submit to you in writing, if that is all right with you. But in the interest of time, I am going to move on now. Thank you very much.

Mr. WRIGHT. Fine. I will be happy to answer those. Thank you very much.

[Mr. Wright's prepared statement and responses to written questions follow:]

FOR RELEASE ON DELIVERY
Expected at 2:30 p.m.
Thursday, June 21, 1984

STATEMENT OF JOSEPH R. WRIGHT, JR.
DEPUTY DIRECTOR
BEFORE THE SUBCOMMITTEE ON INFORMATION MANAGEMENT AND
REGULATORY AFFAIRS OF THE COMMITTEE ON GOVERNMENTAL AFFAIRS
OF THE SENATE OF THE UNITED STATES
ON THE FEDERAL ADVISORY COMMITTEE ACT

Mr. Chairman, thank you for the opportunity to testify today on the Federal Advisory Committee Act. It is an Act for which OMB had oversight responsibilities, until Reorganization Plan No. 1 of 1977; and about which we still have a keen interest.

The Federal Advisory Committee Act was enacted in 1972. On the Senate side, it was the product of hearings of the Senate Governmental Affairs Committee, chaired by Senator Metcalf. The Act acknowledges that advisory committees are often an effective and useful means for the government to acquire expert advice, ideas, and opinions. It establishes procedures governing their establishment and use by Federal departments and agencies, and by the President:

- The Act defines an advisory committee broadly to include any committee, board, commission, council, conference, panel, task force, or other similar group established or utilized by the President or Federal agencies or officers of the Federal Government. It does not cover committees composed wholly of full-time Federal employees.

- The Act requires that all advisory committees file a charter so that they would be accounted for and identified and that certain basic information about them would be made available to the public and to the Congress.

- The Act established certain procedural rules governing the operation of advisory committees:

  -- Advisory committees were required to publish "timely notice" of each meeting in the Federal Register.

  -- Meeting were generally required to be open to the public, although there were provisions allowing the agency head to close meetings. (Currently, the exemptions of the Government in the Sunshine Act govern the closing of meetings).

  -- Subject to reasonable rules and regulations, any interested person was entitled to attend any open

meeting and make or file a statement.

-- Certain records of advisory committees were made subject to the FOIA, and minutes of meetings were required to be kept.

-- A designated employee of the Federal Government was required to "chair or attend" each meeting and the agenda of each meeting was to be approved by that official.

o The Act established mechanisms to permit effective oversight:

-- A Committee Management Secretariat was established in the Office of Management and Budget to review advisory committees' activities, to prescribe administrative guidelines and management controls for their operation, and, in conjunction with the Civil Service Commission, to establish guidelines for fair rates of pay for members, staffs and consultants. Pursuant to Reorganization Plan No. 1 of 1977 and Executive Order No. 12024, dated December 1, 1977, many of the functions vested in the Director of the Office of Management and Budget--including the functions of the Committee Management Secretariat--were transferred to the Administrator of General Services.

-- An annual report by the President was required.

-- A "sunset" provision required agencies and the President to review the need for each committee every two years.

From a review of the legislative history of the Act, it is clear that it has a number of different objectives. While it recognized the utility of such committees it also sought to bring them under effective administrative control. It sought to ensure their efficient operation while limiting their number. It sought to ensure that the President and the agencies were afforded advice they needed from such committees while insulating their operation from undue influence. Not all of these objectives are entirely compatible.

Furthermore, determining the scope of the Act remains very difficult. Officials of the executive branch continually meet with, talk with, get advice from, answer questions for individuals, agencies, organizations and businesses. Defining which of these interactions is subject to the procedures of the Act is a difficult task. Moreover, some of the Act's provisions are not drawn, (we see in retrospect), with great clarity. Some are written in a fashion that permit lawyers to argue over their meaning almost endlessly. And, they have. There is also criticism of the way that the Act has been interpreted by the

courts, and the effect that these decisions and the ambiguities of the Act have had on the ability of agency officials to obtain advice promptly or even to meet with members of the public. I will address some of these problems later in my statement.

On the other hand, the Act has been in existence now for 12 years, and, to all evidence, it has accomplished many of its original objectives. The Eleventh Annual Report of President Reagan on the operation of Federal advisory committees notes that "In keeping with the strong commitment of this Administration to promote . . . citizen participation in government, by year end 1983 the number of chartered advisory committees increased by three percent over the previous year, reaching the highest level since 1976. At the same time, government agencies utilizing these committees achieved a further overall reduction in operating costs . . . 15.2 percent below comparable 1980 levels". One has only to note the work of such advisory committees as the so-called Scowcraft Commission which met to consider ways to accommodate concerns over the basing of the MX missile to understand the benefits which the nation has reaped from their work. Other committees, moreover, which labor in more obscure circumstances, perform equally valuable services. An example of a particularly effective advisory committee in this category is the Chemical Pathology Study Section of the National Institutes of Health. During the past year, this 18 member committee reviewed and ranked 270 applications for research grants requesting over $125 million. Among the research topics this

committee considered were studies of cancer-causing substances in cell culture systems and biological evaluations of toxic chemicals. The committee is made up of Phd's and M.D.'s, who routinely spent one week in preparation for each day spent in meetings.

The President's final assertion in this report bears repeating here: "Consistent with my belief that the strength of this nation flows from the talent and resourcefulness of its people, we shall foster and support the continued active use of advisory committees in the government decision-making process."

Table I below sets forth some facts with regard Federal Advisory Committees over the last several years. For example, at the end of FY 1983, there were 884 chartered committees, roughly the same number that existed at the end of 1980. The total cost for such committees was $75.9 million in 1983, down somewhat from the $88.9 million in 1980. Almost 22,000 citizens participated as members of advisory committees--roughly the same number as in 1980.

We think the management structure established by the 1972 Act, as amended, has brought the advisory committee process under effective executive branch control and congressional oversight. The mechanisms established by the Act have worked to ensure that in making decisions of critical importance to the nation, both the President and the agencies are afforded the vital

participation and opinions of both interested citizens and groups, without incurring the inappropriate and hidden influence of special interest groups. Thus, we do not believe that changes to the procedural requirements of the Act are needed at this time.

More importantly, however, in certain key areas governing when and to what it applies, the Act is unclear, and this lack of clarity has occasioned a number of judicial decisions which have restricted the ability of the heads of agencies to obtain advice; and the ability of the public to give it. Indeed, one court has called the FACA "obscure, imprecise, and open to interpretations so broad as to threaten to impinge unduly upon prerogatives preserved by the separation of powers doctrine." National Anti-Hunger Coalition, et. al. v. Executive Committee of the President's Private Sector Survey on Cost Control, et. al., C.A. No. 82-3592 (D.D.C Feb 24, 1983) Although we have no specific legislative proposals to offer at this time, I would like to discuss a few other consequences of some of these judicial decisions and statutory ambiguities.

The FACA definition of an "advisory committee" has been at the root of most of of the troublesome interpretations. That definition is exceptionally broad:

> The term "advisory committee" means any committee, board, commission, council, conference, panel, task force, or

> other similar group, or any subcommittee or other subgroup thereof . . . which is . . . established by statute or reorganization plan, or established or utilized by the President, or one or more agencies, in the interest of obtaining advice or recommendations for the President or one or more agencies or officers of the Federal Government. . . .

It is so broad, in fact, that it has given rise to a number of different interpretations.

Some courts, realizing the administrative and procedural implications of such an imprecise and all encompassing definition have sought to limit its application, seeking, as Judge Gesell of the U.S. District Court of the District of Columbia has said, "to achieve a common-sense interpretation." Otherwise, the potential, practical consequences of the literal coverage of the Act could be staggering, potentially subjecting thousands of informal meetings or telephone calls, staff meetings etc. which take place in the government every day to the requirements of the Act, e.g. requiring chartering, notice in the Federal Register, open meetings, etc.

Other courts, however, have not taken a common sense approach, and have interpreted the definition in a much broader way, with potentially serious practical consequences for the efficient operation of the government:

- In Natural Resources Defense Council, Inc. v. Edwards, C.A. No. 81-944 (D.D.C Sept. 8, 1981), the District Court for the District of Columbia held that the substantive and procedural requirements of the Act were applicable to informal, one-time, unstructured meetings between the Department of Energy and various representatives of the private sector. Such meetings were conducted by the Department at the request of the President to gather information about an area outside the scope of the DOE's regulatory authority: the processing of spent nuclear fuel by private industry.

- In Center for Auto Safety v. Cox, No. 76-1922 (D.C. Cir., decided June 9, 1978), the Court of Appeals for the District of Columbia held that the relationship between the Federal Highway Administration (FHWA) and a State and local organization, the American Association of State Highway Officials (AASHTO), was sufficient to trigger the provisions of the FACA. FHWA had sent AASHTO copies of proposed regulations governing the Federal-aid highway program and asked for their comments.

While the courts, in both of these cases, narrowed the application of the FACA to the specific facts of the cases before them, these decisions raise serious practical concerns. I do not believe that the Congress in passing the FACA, intended to cover

situations like these discussions between the President or agency officials and members of the private sector. To subject such meetings to all of the cumbersome administrative and procedural requirements of the Act, including advance public notice of meetings, public attendance (including providing an opportunity for interested parties to appear or file statements), transcripts of meetings, access to committee papers, and possibly "balanced membership" requirements, is to effectively preclude such communications altogether.

We believe the Act should only cover committees established by formal action or (as the Administrative Conference of the United States suggests) "affirmatively supported and 'utilized' by the government through institutional arrangements which amount to the adoption of the group as a preferred source of advice." Certainly the Congress could not have meant to effectively preclude one-time or occasional meetings between all groups (regardless of whether they are "committees" in the traditional sense) and government officials. Yet, uncertainty as to whether these meetings are covered works to discourage them, thus depriving the government of useful contacts with the private sector and frustrating the private sector as well.

The question of what is an advisory committee, however, is not the only difficult issue that we think warrants review by this Committee. Here are some others:

- What does the requirement for a "balanced membership" mean and when does it apply? Section 5 of the Act is entitled "Responsibilities of Congressional Committees" and sets forth certain responsibilities for the standing committees of the Senate and the House when they are considering legislation establishing or authorizing the establishment of any advisory committee. This section provides that legislation establishing or authorizing the establishment of any advisory committee shall require its membership to be "fairly balanced" in terms of the points of view represented and the functions to be performed by the advisory committee.

  Subsection (c) of Section 5 of the Act provides "to the extent they are applicable, these guidelines shall be followed by the President, agency heads, or other Federal officials in creating an advisory committee." emphasis added It is not clear from the subsection: (1) whether the President and agency heads or other Federal officials are to ensure fairly balanced representation of views when they are proposing legislation to establish or authorize an advisory committee; or (2) whether the requirement for fairly balanced membership is to have a wider application: or (3) whether the provision does not apply at all to the President, agency heads, or Federal officials, and is simply meant to apply to standing committees of the House and Senate: or (4) whether this is a matter left to the

discretion of the President and the heads of Departments and agencies.

Not only is it unclear when fairly balanced membership is required of the President or the heads of departments and agencies in establishing advisory committees, it is also unclear when it is required. Many advisory committees are established or utilized to gain very specific technical advice, recommendations, and information. Especially in such circumstances, it is not clear what a requirement for fairly balanced representation means.

o Another area of the Act that is susceptible to ambiguous interpretations has to do with the "meetings" of an advisory committee. Although the Act covers "meetings" of advisory committees it does not define the term. Although it is clear that an advisory committee chartered under the Act must operate in accordance with the Act while actually providing advice and recommendations to the President or the head of the agency or official of the executive branch, it is not clear whether other meetings of the advisory committee, held without the presence of the Federal Official, are covered by the Act. What happens, for example, when a duly chartered committee consisting of local officials of a State "goes home" and meets to discuss State issues. Does the Act continue to govern their meetings? Coverage here would seem to be

unintended; but, under certain interpretations of the Act, that might be the consequence.

- It is not clear when subcommittees of the advisory committee are required, themselves, to act like, and be treated under the act as, advisory committees.

- And finally it is uncertain whether Members of Congress as employees of the legislative branch are "Federal employees" for purposes of the Act. If they are Federal employees then their membership on a group which is otherwise wholly composed of Federal employees would not subject that group to the Federal Advisory Committee Act. If they are not Federal employees then their presence on that group may well subject the group to the Federal Advisory Committee Act.

The unintended consequences and the ambiguities of the Act passed in 1972 raise significant practical concerns for Federal agencies, and for the President. Despite judicial interpretations which virtually invite reconsideration of these problems, so far the heads of departments and agencies, and the President have been left to wrestle with the complexities and ambiguities of the 1972 draft. Ironically, the only substantive amendment to date was to further restrict the ability of executive branch agency officials to determine that meetings should not be subject to public notice and attendance.

These then are the areas in which we think legislative clarification is needed. This Committee has heard testimony before concerning these and other problems with the Advisory Committee Act, during, for example, its consideration of S. 1080 which subsequently passed the Senate in 1932. S. 1080 included amendments to the Federal Advisory Committee Act which addressed some of these concerns. However, that legislation did not pass the House.

We would be happy to work with this Committee on solving the fundamental problems that we believe exist with the Act and that we have cited above, in order to produce a legislative initiative that addresses these concerns.

Finally, you asked for our thoughts on the issue of compensating committee members, that is: should they be compensated or should compensation be forbidden. When FACA was passed, the Congress was concerned with establishing an administrative structure to regularize the activities of advisory committees. It recognized that compensation of committee members would be an element of this structure and it provided that OMB in consultation with the Civil Service Commission would establish the necessary pay schedule. That, it seems to me, was a reasonable approach: let the Congress establish the framework and let the executive branch work out the procedures.

But, since you asked specifically about compensation, let me just say that we think the present provisions of the Act are adequate. The Act directs the heads of the agencies to pay compensation as appropriate. In FY 1983, agencies spent $5.5 million compensating advisory committee members. This figure represents only 7% of agencies' total costs of operating advisory committees - not an unreasonable percentage, on its face. Moreover, advisory committees can be extremely useful in bringing outside views to bear on federal policymaking and management. Those whose knowledge and experience are valuable will often be able to serve without compensation, but others may not be able to do so. We believe that a general preference for voluntarism makes sense, since most committee members should be willing to serve as advisors to their government without compensation; but, a policy that effectively precludes compensation will in some circumstances significantly hinder the ability of agencies to obtain the views of those who are not part of the government establishment and at less cost. Moreover, we have detected no large costs or widespread abuses of compensation for federal advisory committee members. If isolated abuses exist, they can and should be handled more directly, on a case-by-case basis, and without restricting compensation that may be necessary to achieve critical governmental goals.

Mr. Chairman, this concludes my prepared statement. I will take any questions you may have at this point.

QUESTIONS FOR THE OFFICE OF MANAGEMENT AND BUDGET
FROM SENATOR ROTH

Question # 1:

The Committed Management Secretariat (CMS) in GSA has major responsibility for the administration of the Federal advisory committee system. Sponsoring agencies, however, have certain responsibilities for the proper operation of the system as well. How would you differentiate the respective roles of GSA and the sponsoring agencies in the advisory committee system?

Answer:

GSA and the sponsoring agencies have separate and distinct roles. GSA's major role is to discharge the program oversight functions delegated by the President through Executive Order 12024 issued in 1977. GSA provides technical advice and assistance to agencies in establishing, renewing, and operating committees, and monitors committee performance on behalf of the President, the Congress, and the public. Federal agencies have primary responsibility to determine the need for their own advisory committees and to define their committees' objectives, membership criteria, resource needs, and duration.

Question # 2:

In your view, does the biannual review of committee charters ensure that inactive committees are not rechartered? In what ways could the rechartering process be strengthened to help guarantee that only active, productive committees are rechartered?

Answer:

GSA has the responsibility for reviewing those advisory committees established by agencies at the time of their biennial renewal. GSA has no responsibility for reviewing statutorily mandated committees. GSA has reported that "inactive" statutorily created committees are being renewed and committees which have been defunct for years are still being counted and reported by Federal agencies. Congress has not acted on recommendations by agencies to abolish several of these committees. For those committees established by agencies, GSA has reported to us that it does attempt to consider past accomplishments, costs, and problems, as well as projected activities to determine the advisability of continuing a committee. The Office of Management and Budget, as invited, provides comments to GSA to determine if the committee is functioning within generally accepted guidelines. The rechartering process is being streamlined as GSA implements its new regulation on advisory committee management and automates committee management files and data. In general, we believe the process is working satisfactorily, though that is a judgment to be made primarily by GSA.

Question # 3:

Does the remaining shared responsibility between GSA and OMB create a weakness in the advisory committee system? If so, how might this coordinative function be improved?

Answer:

This is primarily a GSA activity. We do not believe the limited OMB role creates any weakness in the advisory committee system. With the implementation of the interim rule on committee management by GSA in April of 1983 and the rescinding by OMB of the previous management directive, Circular A-63, GSA assumed full responsibility for the oversight of the advisory committee program. GSA continues to invite OMB's comments which GSA uses in reviewing advisory committee proposals received from Federal agencies.

QUESTIONS FOR THE OFFICE OF MANAGEMENT AND BUDGET
FROM SENATOR DANFORTH

Question # 1:

In his message accompanying the 1983 report on FACA, the President stated, "I plan to issue shortly a memorandum to Executive branch agencies providing further guidance to sustain and improve upon these accomplishments." Can you tell us what areas will be emphasized in that memorandum? In particular, will the President require improved agency follow-up on committee recommendations?

Answer:

This memorandum is presently under review in the White House. We believe the memorandum will be responsive to agency follow-up to committee recommendations.

Question # 2:

According to GAO, only two and a fraction persons are assigned to the GSA Committee Management Secretariat. Don't we need to increase the resources there to carry out the Act properly?

Answer:

The resource requirements of the GSA Committee Management Secretariat have been increased during the past year with the recruitment of an additional professional staff person in January and authorization of a fifth position at a trainee level. We believe the present resources are sufficient, though that is an issue which GSA must address.

Question # 3:

Will OMB prepare an omnibus bill proposing the termination of unneeded advisory committees? When can we expect it?

Answer:

Since GSA now has responsibility for oversight of the Advisory Committee Program, GSA can perform this service as part of the annual review of advisory committees. GSA plans to poll all agencies this Fall for their recommendations of defunct committees which can be included in an "omnibus" bill to Congress. We will review such a bill, if initiated by GSA, through the usual legislative clearance process.

We would be happy to work with Congress on some type of omnibus legislation to terminate committees that are outdated, or not fulfilling their intended purpose.

Senator DANFORTH. The next witness is Patricia Schoeni, Associate Administrator for Administration, General Services Administration.

Mrs. Schoeni, please proceed.

TESTIMONY OF PATRICIA Q. SCHOENI, ASSOCIATE ADMINISTRATOR FOR ADMINISTRATION, GENERAL SERVICES ADMINISTRATION

Mrs. SCHOENI. Good afternoon, Mr. Chairman. It is a pleasure to appear before you today to discuss the Federal Advisory Committee Program, for which the General Services Administration has oversight responsibility within the executive branch.

During the past 3 years, GSA has played a very active role in promoting greater efficiency and accountability in the use of Federal advisory committees. Central to this effort has been the implementation of a new interim regulation in April 1983 which spells out numerous actions that can be taken by Federal agencies to improve advisory committee management.

GSA has also been concerned about Federal expenditures and has identified ways to achieve meaningful cost savings in the Advisory Committee Program. As Mr. Wright pointed out, since 1980, Federal agencies have reduced overall advisory committee costs from $87 million to $75.8 million in 1983, a 13-percent savings. Yet, the number of committees and committee meetings, as Mr. Wright has pointed out, has been at the highest level in recent years. Although costs have been reduced, additional improvements can and should be made in committee management throughout the Government.

GSA has sought to strengthen committee management by completely revamping and expanding the annual report the President submits to the Congress. For the first time last year the annual report contained narrative, charts, and analysis of advisory committee activities and expenditures beyond the summary data provided in previous years. As a result of this approach to the report, there has been a great interest in the advisory committee program from the Congress, the media, the public, and Federal agencies.

GSA has authority to establish and implement administratively advisory committee management regulations. With regulations, changes are possible. However, as a matter of policy, the administration generally opposes the codification of regulations into law, since regulations provide more flexibility to adapt to changing circumstances. Therefore, we do not feel that legislating requirements will significantly increase their effectiveness.

GSA, in the annual report and in other communications, has identified several areas of the advisory committee program where the Congress and this subcommittee may wish to focus its attention. The most basic issue, as Mr. Wright again pointed out, is the definition of an advisory committee. GSA has attempted to clarify some of the gray areas of the definition through its interim rule. However, the legislative history accompanying the Federal Advisory Committee Act, as well as recent court cases, leave the agencies, the public, and GSA with a sense of uncertainty whether certain meetings fall under the Federal Advisory Committee Act. Federal officials have been sued for holding single meetings which the courts have subsequently interpreted to be advisory committee meetings.

Concurrent with the problem of the definition of a committee is the administrative burden placed on an agency to hold a meeting. The process of setting up a committee and giving sufficient advance notice of a meeting can consume weeks of time, a circumstance which poses a dilemma to an agency requiring quick response or resolution of a problem. Agencies are sometimes forced to choose between being thorough and being responsive. They must forego access to expertise and advice from private citizens, or they must seek some means to obtain the advice in a manner that places them at risk of violating the spirit, if not the letter, of the Federal Advisory Committee Act.

Congress should also give attention to eliminating defunct advisory committees created by statute which agencies must continue to report and account for each year and which by their continued presence contribute nothing except to increase the administrative costs of the Federal advisory committee program. In its most recent survey, GSA has identified 47 advisory committees which agencies propose to terminate but which require legislation to do so. Agencies have made specific proposals to the Congress for some of these committees but have simply given up in several cases where past recommendations to the Congress have gone unheeded.

The Federal advisory committee program is a source of great benefit to the Federal Government and to the American people by providing access to a wide range of expertise in the private sector which can be used effectively to help solve problems and make tremendous contributions to the well-being of all citizens. We in GSA are prepared to lend our full assistance to those efforts that will further improve the Federal advisory committee program.

In closing, Mr. Chairman, we at GSA want to express our appreciation to Senator Nickles and to this subcommittee for your interest in the committee management program and for your efforts to improve that program.

I would be glad to answer any questions you have.

Senator DANFORTH. Thank you very much for your testimony. We will have, I am sure, some written questions to submit to you, but I have no oral questions to ask at this time.

Mrs. SCHOENI. Fine. Thank you.

Senator DANFORTH. Thank you.

[Responses to written questions submitted by Senators Roth and Danforth follow:]

RESPONSES TO WRITTEN QUESTIONS SUBMITTED BY SENATOR ROTH

Question 1. The Committee Management Secretariat (CMS) in GSA has major responsibility for the administration of the Federal advisory committee system. Sponsoring agencies, however, have certain responsibilities for the proper operation of the system as well. How would you differentiate the respective roles of GSA and the sponsoring agencies in the advisory committee system.

Answer. GSA's major role is to discharge the program oversight functions delegated by the President through Executive Order 12024 issued in 1977. Federal agencies have primary responsibility to determine the need for their own advisory committees and to define their committees' objectives, membership criteria, resource needs, and duration. The operational responsibilities of Federal agencies are summarized in section 101–6.1009 of the GSA interim rule on advisory committee management, issued April 28, 1983, which accompanies this response.

GSA provides technical advice and assistance to agencies in establishing, renewing, and operating committees, and monitors committee performance on behalf of the President, the Congress, and the public. GSA performs periodic studies and program reviews and prepares recommendations to improve committee management which are submitted to Federal agencies, the President, and the Congress for administrative or legislative attention.

Question 2. In your view, does the biennial review of committee charters ensure that inactive committees are not rechartered? In what ways could the rechartering process be strengthened to help guarantee that only active, productive committees are rechartered?

Answer. Since nearly 45% of all advisory committees are directed by statute. and an additional 25% are "authorized" by legislation, the Congress has had a direct hand in creating the majority of advisory committees in existence. Although committee charters must be renewed every two years, GSA plays no role in reviewing statutorily mandated committees. GSA has found that not only are "inactive" committees being renewed, but statutorily created committees which have been defunct for years are still being counted and reported by Federal agencies. Agencies have recommended that several of these committees be abolished, but the Congress has not acted on these recommendations. In the President's Twelfth Annual Report, Federal agencies reported that during fiscal year 1983, 857 committees would be recommended for renewal, 3 would be merged with other committees, and 113 would be slated for termination. Of the committees to be terminated or merged, 47 would require legislation to do so.

GSA does review those advisory committees established by agencies at the time of their biennial renewal through a process known as "consultation." GSA does attempt to consider past accomplishments, costs, and problems, as well as projected activities to determine the advisability of continuing a committee. Program comments are often invited from the Office of Management and Budget and occasionally from other agencies and sources to determine if the committee is functioning within generally accepted guidelines. Because of the large number of committees involved, the current review process is limited by available resources and depends in good measure on information reported by the sponsoring agencies. The rechartering process is being streamlined as GSA implements its new regulation on advisory committee management and automates committee management files and data. A more thorough review of committee activities, including the renewal process, would require additional resources at GSA as well as close followup by the Congress of findings and recommendations reported to it.

Question 3. Does the remaining shared responsibility between GSA and OMB create a weakness in the advisory committee system? If so, how might this coordinative function be improved?

Answer. With the implementation of the interim rule on committee management by GSA in April of 1983 and the rescinding by OMB of the previous management directive, Circular A–63, GSA assumed full responsibility for the oversight of the advisory committee program. Because of GSA's limited resources and the availability of government-wide program expertise and budgetary information at OMB, GSA continues to invite OMB comments which GSA uses in reviewing advisory committee proposals received from Federal agencies. In effect, GSA has overall program responsibility, and has developed what amounts to a partnership of support from OMB. We, therefore, do not consider this current arrangement to be a weakness, and we are continuing to work with OMB in improving and strengthening the oversight process.

[From the Federal Register, vol. 48, No. 83, Apr. 28, 1983]

SECTION 101–6.1009. WHAT RESPONSIBILITIES DOES AN AGENCY HEAD HAVE FOR AN ESTABLISHED ADVISORY COMMITTEE OR SUBCOMMITTEE AS SPECIFIED IN SECTION 101–6.1007?

(a) The agency head shall:

(1) File the charter as specified in Section 101–6.1013;

(2) Issue agency regulations or guidelines as may be necessary to operate and oversee the advisory committee;

(3) File required documents;

(4) Publish required notices in the Federal Register;
(5) Designate a Committee Management Officer for the agency;
(6) Appoint a Designated Federal Official for each advisory committee;
(7) Ensure the opportunity for public participation as required;
(8) Ensure that detailed minutes are kept of each advisory committee meeting;
(9) Ensure that certain rates of pay are justified;
(10) Submit required reports; and
(11) Terminate the advisory committee when appropriate.
(b) The agency head should:
(1) Not later than the initial meeting of an advisory committee, submit to committee members, committee staff, consultants, and appropriate agency management personnel a written statement of the purpose, objectives and expected accomplishments for the committee.
(2) Solicit in writing or in a formal meeting at least annually the views of the committee members on the effectiveness, activities, and management of the committee, including recommendations for improvement. Comments received should be reviewed by the agency head or senior policy official responsible for the committee to determine whether improvements or corrective action is warranted. Copies of such recommendations should be retained until the committee is terminated or renewed.
(3) Involve key management personnel of the agency whose interests are affected by the committee in committee meetings, including reviewing reports and establishing agendas.
(4) Limit membership on advisory committees to 25 members for committees with an agency-wide mission and 12 members for committees with a more narrowly defined function or specialized area of interest. An agency head may authorize additional members for a committee when the agency head determines that such additional members are necessary to the function of the committee or to achieve balanced membership.
(5) Periodically but not less than annually review the level of agency staff support dedicated to advisory committees to ensure that expenditures are justified in consideration of committee activity and the benefits accruing to the Government.
(6) Monitor the attendance and participation of advisory committee members and consider replacing any member who has missed a substantial number of scheduled committee meetings.
(7) Establish meeting dates and distribute agendas and other meeting materials well in advance.

RESPONSES TO WRITTEN QUESTIONS SUBMITTED BY SENATOR DANFORTH

Question 1. Last April you issued an interim rule on Federal advisory committee management. Recently, OMB rejected your proposed final rule, yet the interim rule continues in effect. When do you plan to come back with a new final rule, and how will it be different?

Answer. GSA has had numerous discussions and correspondence with officials at OMB concerning the final rule on committee management. We are presently preparing a revision to the rule to conform with the specific policy objectives stated by the President and OMB, and are working to achieve issuance of the final rule as soon as possible.

Question 2. Your 1983 annual report was due on December 31 but was issued on June 20. What was the cause of the delay? Will you meet this year's deadline?

Answer. GSA must accept some responsibility for the lateness of the report. The delay was caused by several factors. Data upon which the report is based was not received from all agencies until nearly two-and-one-half months after the reporting deadline established by GSA. In some cases, GSA did not receive data until the middle of January, 1984, nearly a month after the report was already to have been written and delivered to the Congress. In addition, beginning in 1983 GSA expanded the information contained in the report in order to make it more comprehensive and informative. Because agencies and GSA have now completed the one-time transition of the reporting cycle from a calendar to a fiscal year basis required by Congress which became effective this past year, and with the experience of reporting and processing the additional data elements which are now included in the report, GSA will make every effort to meet the statutory deadline.

Question 3. According to GAO, only two and a fraction persons are assigned to the GSA Committee Management Secretariat. Don't we need to increase the resources there to carry out the Act properly?

Answer. The resource of the GSA Committee Management Secretariat have been increased to five persons during the past year with the recruitment of an additional professional staff person in January and authorization of a fifth position at a trainee level. We believe these resources are sufficient to perform the job assigned to GSA.

Question 4. Your 1983 annual report shows several committees reporting no accomplishments. In your view, does this reflect sloppy reporting by the agencies or a genuine lack of accomplishments?

Answer. For the first time ever, GSA reported committee accomplishments in the Annual Report based on data furnished by agencies. The lack of reporting does not necessarily mean that a committee had failed to meet or function during the year. While some committees were inactive, others were the subject of inadequate reporting by their sponsoring agencies. GSA has stressed our commitment to careful monitoring of committee reports and activities. By including GSA's findings in the Annual Report, it is hoped that where necessary agencies will give more careful attention in the future to reporting committee accomplishments and activities.

Senator DANFORTH. Senator Durenberger, I am told, is headed this way. He will be available to chair the rest of the meeting. He, in turn, has to leave by about 3:25, so any help that the other witnesses could give in abbreviating their testimony would be very much appreciated.

I am just going to have to leave now, I am sorry to say, so for the next few minutes the committee will be in recess.

[Brief recess.]

Senator DURENBERGER [presiding]. I am going to have trouble staying more than about 25 minutes.

Mrs. Rosslyn Kleeman, Associate Director, General Government Division, General Accounting Office. Glad to have you here.

TESTIMONY OF ROSSLYN KLEEMAN, ASSOCIATE DIRECTOR, GENERAL GOVERNMENT DIVISION, GENERAL ACCOUNTING OFFICE, ACCOMPANIED BY NYE STEVENS, GROUP DIRECTOR, AND RAYMOND BICKERT, EVALUATOR

Ms. KLEEMAN. I would like to submit my statement for the record.

Senator DURENBERGER. That will be made part of the record.

Ms. KLEEMAN. I will try to summarize as briefly as I can.

We are going to discuss today the review that Senator Roth and Senator Danforth requested. Since we are still preparing a draft report, I will base my remarks today on preliminary results.

I have with me today Nye Stevens and Ray Bickert, who did the study for us.

In our work, we were asked to review the functions of the Committee Management Secretariat of the GSA, and we looked at the operations of 68 advisory committees. In general we found a conscientious effort in all of these agencies to adhere to both the spirit and the requirements of the act.

We were asked to review GSA's performance in guiding and managing agencies' compliance with the act. I would like to say that we found GSA extremely cooperative and very open with us. It was a good relationship.

However, we did find that GSA has been only partially effective in meeting their statutory responsibilities assigned to them by the act. But for the last several years they have only had two and a fraction

full-time professional staff members to carry out their committee management functions. They have placed their primary emphasis on developing the Governmentwide guidelines and preparing the expanded report to the Congress. Other assigned functions, such as reviewing charters and reviewing and monitoring agency compliance, have received less attention. One function, submitting followup reports on Presidential committee recommendations, received no attention at all.

Given their limited resources, we have no reason to criticize the way they have set their priorities. But if the administration and the Congress want the Committee Management Secretariat to manage their advisory committee system as thoroughly as the Advisory Committee Act envisions, we do think that this is unlikely to occur unless the function is given more attention and perhaps more staff resources.

The second question we were asked to look at was whether the act should be amended to require agency heads to respond formally to recommendations of their program and policy advisory committees. Section 6(b) of the act requires the President to report to the Congress within 1 year on what action has been taken on recommendations of the committee reporting directly to him.

Our review found that the section 6(b) requirement has not been observed by Presidents in recent years. Also, responses given by agency leadership to agency level program advisory committees showed that formal written responses were not the most common or necessarily the most effective method. We found when there was formal discussion that these were much more effective.

We were also asked to look at GSA's compensation policy. Early indications lead us to believe that this policy is inequitable and should not be issued in final form. The policy, which is included in GSA's interim regulations, seems to diminish the value to the Government of the hard and often unglamorous work involved in much advisory committee activity. This is particularly true with grant and peer review committees where there has to be careful reading and evaluation of many proposal documents.

In our opinion, since advisory committees vary greatly in nature, scope, and technical complexity, agency heads are in the best position to know when compensation is needed.

We were also asked to assess the effect of a 1983 court ruling in the *President's Private Sector Survey on Cost Control* case. The court held that the Advisory Committee Act covered only those advisory committee subcommittees or subgroups that provided advice or recommendations directly to a Federal office. But since most subcommittees or subgroups in fact report to their parent committees rather than reporting directly to a Federal official, this appears to us to be a major potential loophole in the act.

Our survey didn't reveal that any agencies have changed their practices in response to the court decision, but given the possible implications of the court decision, Congress may want to consider amending the Advisory Committee Act to make clear that all subcommittees are subject to the Federal Advisory Committee Act.

A final question you asked us to review was whether significant conflicts of interest are arising in the operations of advisory committees that evaluate grant applications or requests for regulatory approvals. We had previously reported that the scientific advisory committees at

the Department of Defense failed to resolve some potential conflicts of interest. The five domestic agencies that you requested we review for conflicts of interests didn't have comparable inadequacies. All five had sufficient guidelines and procedures in place to prevent conflicts in their peer, grant, and technical review committees.

The apparent conflicts that we found could have been prevented if the agencies involved had adhered strictly to their procedures and to the guidelines issued by the Office of Government Ethics. Based on our discussions with the agencies, I expect that they will agree and make the adjustments that we have suggested.

We were also asked to comment on S. 2127. Those comments are in our formal statement, so I would like to just conclude and answer any questions you may have.

Senator DURENBERGER. Thank you.

Way back in the beginning of the statement you talked about two or two and a half people when you were talking about the GSA role. Do you have a recommendation about how much staffing would be adequate to discharge the responsibilities?

Ms. KLEEMAN. We didn't include a position management study in our work, so it would be pretty hard to say. We do know it took about 5 staff years when the program was at OMB. They were able to cover most areas. Some of the staffing would be dependent on how many additional responsibilities the Congress added to GSA's management as a result of this review. We do think that GSA has been a good home for the Committee Management Secretariat. But I couldn't give you an exact number. Five or six I suspect could do it, based on previous experience at OMB.

Senator DURENBERGER. This is all relatively new to me, but it looks like there was some debate that went on before I got here over compensation and a variety of other things. One question, out of curiosity, I guess, on the compensation side, someplace in here it says that most of the agencies that are paying some kind of a per diem are paying at a lower level than the permitted maximum. Is that correct?

Ms. KLEEMAN. It is lower. Our feeling is that it is inequitable the way it is now, with some being compensated and some not. The majority of the people we feel should be compensated are those academics who do the very hard work of the technical and scientific committees and grant and peer review committees. The academics earn this very modest compensation.

Senator DURENBERGER. Is there any question about the expense reimbursement side? Is the policy comparable through all of these agencies, that we reimburse for travel and other expenses?

Ms. KLEEMAN. It is the same per diem and the same travel expenses. Should the committees use consultants, which I believe is one of the provisions of S. 2127, the Nickles bill, the consultants are usually paid at a much higher rate than the rate we are paying under the Advisory Committee Act right now. The compensation covers only 7 percent of the total cost of advisory committees.

Senator DURENBERGER. Thank you very much.

Ms. KLEEMAN. You are welcome.

Senator DURENBERGER. I appreciate seeing you again and appreciate your testimony.

[Ms. Kleeman's prepared statement and responses to written questions submitted by Senator Roth follow:]

UNITED STATES GENERAL ACCOUNTING OFFICE
WASHINGTON, D.C. 20548

FOR RELEASE DURING
HEARINGS SCHEDULED
JUNE 12, 1984, at
10:00 A.M.

STATEMENT OF

ROSSLYN S. KLEEMAN, ASSOCIATE DIRECTOR
GENERAL GOVERNMENT DIVISION

BEFORE THE

SUBCOMMITTEE ON INFORMATION MANAGEMENT
AND REGULATORY AFFAIRS
COMMITTEE ON GOVERNMENTAL AFFAIRS

UNITED STATES SENATE

ON

THE FEDERAL ADVISORY COMMITTEE ACT

Mr. Chairman and Members of the Subcommittee:

I am pleased to be here today to discuss the review that you and Senator Roth requested on the administration and implementation of the Federal Advisory Committee Act (FACA) of 1972. In doing so, I will comment on Senate bill 2127 as it relates to the issues raised in your request. I must caution that we are now preparing our draft report so my remarks represent the preliminary results of our work.

In considering and passing the Federal Advisory Committee Act 12 years ago, the Congress endorsed the value of using committees made up of private citizens to advise federal officials in the exercise of their responsibility, recognizing that this mechanism could make available information, perspective, and insight to the formulation of public policy at relatively modest cost.

In response to your request, we have reviewed the functions of the Committee Management Secretariat at the General Services Administration (GSA) and the operations of 68 advisory committees located in the National Science Foundation (NSF), the National Endowment for the Humanities (NEH), the Department of Education, and three components of the Department of Health and Human Services--the Office of Human Development Services, the Food and Drug Administration (FDA), and the National Institutes of Health (NIH). In general, we found a conscientious effort in

all of these agencies to adhere to both the spirit and requirements of the act. While we identified some problems, as I will explain, they can be resolved through administrative adjustments. We believe none of em is intrinsically serious enough to warrant a major overhaul of the act.

Allow me now to respond to the five specific questions raised in your request.

GSA'S OVERSIGHT ROLE

First, you asked us to review GSA's performance in guiding and managing federal agencies' compliance with the act. This responsibility has been carried out by GSA's Committee Management Secretariat (CMS) since the function was transferred from the Office of Management and Budget (OMB) in 1977.

We found that GSA has been only partially effective in meeting the many statutory responsibilities assigned to it by the act. For the last several years, only two and a fraction full-time professional staff members have been allocated to the committee management function.

The limitation on its staff resources has required the CMS to set priorities among its various responsibilities. CMS has been fairly successful in carrying out its top priorities, less so in others, and at least one responsibility has received no attention at all. CMS has placed primary emphasis on developing governmentwide guidelines to promote effective advisory committee management and preparing an expanded annual report to the

Congress, which covers advisory committee numbers, costs, and activities. Its interim regulation published in April 1983 addressed a number of problems in interpreting the act's requirements. Another responsibility, evaluating agency charter requests, is a secondary order of priority. Other assigned functions, such as monitoring agency efforts to comply with requirements for balanced committee memberships and for adequate notice and minutes of meetings and providing guidance and assistance to individual committees, received less attention and are done only sporadically. One function, submitting follow-up reports on Presidential committee recommendations, received no attention at all, and the statutory requirement has not been met.

It should be noted that CMS does not have the necessary knowledge of agency programs to review all advisory committee charters thoroughly. CMS depends on an assessment by OMB to determine whether a committee proposed for renewal, establishment, or reestablishment is necessary, or whether it duplicates the function of an existing committee. Of 192 chartering requests GSA received in FY 1983, CMS sent 118 to OMB for their review. Most of the remainder were relatively routine renewal requests.

Given the limited resources allocated to committee management and oversight in the GSA budget, we have no reason to criticize CMS for setting priorities on its responsibilities or for the priorities it has chosen. It should be noted, however,

that if the administration and the Congress expect CMS to manage the advisory committee system as thoroughly as the act envisions, by carrying out all of its assigned responsibilities, this is unlikely to occur unless the CMS function is upgraded and given more resources. Moreover, if the Congress decides to add new management requirements through legislation, this will place an even greater strain on the Secretariat's resources.

RESPONSE TO ADVISORY COMMITTEE RECOMMENDATIONS

The second question you asked us to consider was whether the act should be amended to require agency heads to respond formally to the recommendations made by their subordinate program and policy advisory committees. Section 6(b) of the act already requires the President to report to the Congress within 1 year on what action has been taken on the recommendations of committees reporting directly to him.

Our review found that the Section 6(b) requirement has not been observed by Presidents in recent years. While GSA is delegated responsibility to prepare a report on the official reaction to Presidential advisory committee recommendations, GSA has not done so. We were told by a CMS official that this function is a low priority for CMS' limited staff and that the requirement is viewed internally as a needless formality, notably when it involves one administration responding to the committees set up by a previous administration.

Our review of the responses given by agency leadership to the eleven agency-level policy and program advisory committees in our sample that issued formal recommendations, showed that a formal, written response to the recommendations was not the most common or necessarily the most effective form. Only two committees received a written response. Three of the committees received no response or feedback at all. But in the other six cases, we found that a structured oral response was given to the committees, often allowing for dialogue. Based on our observations during several of these meetings and the review of documents relating to other meetings we believe the oral responses were an effective means of communication.

We also learned in the course of our review that the White House has an initiative under way to improve the quality of consideration given to the recommendations of agency advisory committees. The interim GSA regulations also recommend more direct communication between agency heads and their advisory committees. Based on these initiatives, we believe enough attention is being devoted to ensuring that agency advisory committee views are given appropriate consideration, and additional legislation requiring documentation is not likely to improve the situation.

NONCOMPENSATION POLICY

You also asked us to evaluate the actual and potential effects of GSA's interim regulation that instructs agencies not to compensate advisory committee members, except when required

by law or when essential to provide qualified and balanced committee membership. Although GSA's noncompensation policy has been issued only on an interim basis, early indications cause us to believe that the policy is inequitable and should not be issued in final form. The policy seems to diminish the value to the government of the hard and often unglamorous work involved in much advisory committee activity. Grant and peer review committee meetings, for example, are generally preceded by careful reading and evaluation of proposal documents. Most members of these committees are members of the academic community who do such work for a living, and who customarily supplement their academic salaries with outside consulting. For this reason, we were told, nearly all agencies have offered some remuneration to members of peer and grant review committees.

Furthermore, specific statutory provisions authorize agency heads to compensate many committee members. Therefore, these members will be able to continue receiving compensation under the noncompensation policy while other members might not. Of some 19,000 individuals serving on advisory committees in 1982, about 40 percent or 7,700 were compensated for their services. Five agencies account for 6,617, or slightly over 85 percent of the compensated advisory committee members. Because four of the five agencies are required or authorized by law to compensate committee members, 5,641 of the 6,617 would not be affected by GSA's noncompensation policy.

Finally, compensation for advisory committee members amounts to only 7 percent of advisory committee costs. In part, this is because compensation rates are usually set by agency heads at the level of $100 per day, rather than the maximum of $245 allowed by law. They are thus more an honorarium than a fee. Since compensation is required or authorized by separate statutory provision for most compensated advisory committee members, not all of the $5.5 million the government paid for member compensation in 1982 would be saved by implementation of the policy.

In our opinion, since advisory committees vary so greatly in nature, scope, and technical complexity, agency heads are in the best position to know when the compensation of advisory committees is needed to fulfill their agencies' missions.

COVERAGE OF SUBCOMMITTEES

You also asked us to assess the effect of a 1983 court ruling in the case of National Anti-Hunger Coalition v. Executive Committee of the President's Private Sector Survey on Cost Control that exempts certain advisory committee subgroups from public accountability. The court held that FACA covers only those advisory committee subcommittees or subgroups that provide advice and recommendations directly to a federal official. Since most subcommittees or subgroups do in fact report to their parent committee, rather than bypassing the parent committee and reporting directly to a federal official, this does appear to us

to be a major potential loophole in the act. Eight of the 17 policy and program advisory committees we examined held a total of 52 subgroup meetings in 1982, all of which could have been exempt from the act's requirements if the agencies had wished to press the point made by the court in the Private Sector Survey decision. The Navy Department, partly based on the court decision, believes that panels of the Naval Research Advisory Committee are not covered by the act. Our survey of nine agencies on this point did not, however, reveal any that have changed their practices in response to the court decision. Thus the ambiguity in the act regarding its application to subgroups remains a potential loophole. Given the potential implications of the Private Sector Survey decision the Congress may want to consider amending the FACA to make clear that all subcommittees, not just those few that provide advice directly to a federal official, are subject to the FACA.

CONFLICT OF INTEREST CONTROLS

The final question you asked us to review was whether significant conflicts of interest are arising in the operations of advisory committees that evaluate grant applications or requests for regulatory approvals. The Advisory Committee Act itself does not have conflict of interest provisions, but agencies are required by the Ethics in Government Act and Executive Order 11222 to develop guidelines and procedures to prevent the appearance of conflicts of interest among special government em-

ployees. We reported to the House Committee on Government Operations in September 1983 that scientific advisory committees at the Defense Department failed to resolve potential conflicts of interest for 32 of 117 panel members whose interests we reviewed. We recommended a number of improvements in DOD's procedures and DOD agreed to implement them.

The five domestic agencies that we reviewed for conflicts of interest at your request did not have comparable inadequacies. All five--NSF, NEH, NIH, and FDA, and the Department of Education--had sufficient guidelines and procedures in place to prevent conflicts and the appearance of conflicts in their peer, grant, and technical review committees. At two agencies--Education and FDA--not only were the procedures effective, but also they were followed with such consistency that we did not find a single instance where the appearance of a conflict of interest had not been identified and resolved in advance of an advisory committee meeting. The minutes of advisory committee meetings at these two agencies documented each case where a disqualification or waiver was exercised, even though including this notation in the minutes is not specifically required by law.

Altogether, we reviewed the financial disclosure and biographical statements for 528 individual committee members, and we compared them to the affiliations and relationships of several thousand grant applicants that came before their committees. We found only 32 instances, involving 27 advisory

committee members, where apparent conflicts had not been identified, resolved, and documented according to applicable law and procedure. Most of these apparent conflicts involved committee members evaluating grant or project applications from the same institution with which they were affiliated, or at a different campus of the same overall university system. These instances were neither large in number nor egregious in nature, but they could have been prevented if the agencies involved--NIH, NSF, and the National Endowment for the Humanities--had adhered strictly to their procedures and to guidelines issued by the Office of Government Ethics. Based on informal discussions, I expect that the agencies will agree and make these adjustments. In our opinion, this situation is not so serious as to justify recommending a statutory remedy.

PROPOSED LEGISLATION

In inviting us to testify at this hearing, you requested that we comment on the provisions of S. 2127, which provides for several amendments to the Federal Advisory Committee Act. In general, this bill puts into statutory form many of the requirements or guidelines that GSA has provided agencies through its interim rule on advisory committee management.

As should be clear from my testimony on the compensation issue, we do not believe that GSA's policy on compensation should be enacted into law. In fact, the bill's provision requiring that where voluntary service cannot meet a committee's

need, an individual should be appointed as a consultant, may actually result in higher compensation for some individuals because consultant pay often exceeds the level of an honorarium.

In addition, it is not clear whether the bill's provision prohibiting compensation of committee members "unless specifically required by law" is intended to override the specific statutory provisions that authorize agency heads to compensate committee members.

Section 104 of the bill deals with the coverage of subcommittees. However, it does not resolve the problem of coverage raised by the Private Sector Survey case. As discussed earlier, the Private Sector Survey case held that the act applies only to those subcommittees that provide advice directly to a federal official, not to those subcommittees reporting to their parent committees. The bill does not explicity bring under the act subcommittees that report directly to their parent committees and thus are not now subject to the act under the Private Sector Survey decision. Specifically, because the bill does not define which subcommittees are covered, the court's interpretation in the Private Sector Survey case limiting the act to subcommittees reporting directly to a federal official would remain unchanged. The intent of the bill could be clarified by adding language specifying all subcommittees--those that report to parent committees as well as those that report directly to a federal official--are intended to be covered to the same extent as parent committees.

We might add that if the bill were amended to encompass such subcommittees and to create a corresponding expanded monitoring and oversight role for GSA, this is unlikely to be effective unless GSA is given more resources for this task. As we pointed out earlier, at present staffing levels it is unlikely GSA would be able to monitor carefully the composition and activities of parent committees, much less a new complement of subcommittee submissions.

That concludes my prepared statement, Mr. Chairman. I would be pleased to respond to any questions that you or other members of the subcommittee may have.

ENCLOSURE ENCLOSURE

5. Question

(a) In your research did you identify any abuses in the granting of compensation for advisory committee participation?

(b) Did you perceive that agency administrator discretion for granting compensation was generally used wisely?

(c) Did you identify instances where compensation was not granted?

Response

(a) No

(b) Yes, at the agencies we visited, agency heads appear to be using public funds economically since 5,368, or about 75 percent of the 7,130 compensated members received a daily rate of compensation ranging from $75.00 to $135.00, considerably less than the highest allowable daily rate of $225.00 authorized by the FACA for committee members and outside consultants. Agency officials told us this level of compensation is regarded as an honorarium rather than full payment for services rendered.

(c) Each of the agencies we visited generally compensates committee members, usually as specified in statute. According to GSA's twelfth annual report on federal advisory committees (covering fiscal year 1983) 22 of 54 agencies did not grant compensation. However, a CMS official advised us that to his knowledge, all agencies compensate members of peer and grant review committees.

ENCLOSURE ENCLOSURE

GAO RESPONSES TO ADDITIONAL QUESTIONS
SUBMITTED BY SENATOR ROTH FOR THE RECORD

1. Questions

"If you could design the ideal Committee Management Secretariat to carry out all of the advisory committee responsibilities assigned to GSA, what would it look like?

What would be its size, how would it be organized and what would it do?"

Response

Since we did not perform a position management study as part of our review, it would be difficult to specify exactly what the staffing level should be. We do know that when the committee management function was at OMB, it took about five staff years to fulfill most advisory committee responsibilities. We see no reason why GSA would need less staff than OMB to perform the same function. Also, there was a full-time manager of the CMS at OMB, while the GSA staff manager has other, unrelated responsibilities as well.

The functions of the CMS are specified fairly well in the act. If the act is amended to add additional monitoring and oversight responsibilities, GSA will need to make some staff adjustments to carry them out, since GSA is already unable to carry out some functions at the level of effort contemplated by the authors of the original legislation.

Furthermore, if the National Archives and Records Service is removed from GSA, as pending legislation provides, the CMS function should be retained within GSA. There is no reason for this function to be insulated from direct control of the administration.

2. Question

"In your view does the remaining shared responsibility for advisory committees between GSA and OMB create a weakness in the system? If so how might this coordinative function be improved?"

Response

From the timeliness perspective there is some problem. CMS and OMB often take longer than the 15-day response time agencies have been given to expect as an appropriate response time for

the approval of charter requests. However, we have found no evidence that the CMS function should be transferred back to OMB, especially in view of OMB's reluctance to re-assume this responsibility.

3. Question

"You mention that the charter review process in GSA is of a secondary order of priority. Please cite any examples of problems that this creates in the advisory committee system."

Response

GSA's timeliness goal in approving charters is often exceeded. OMB Circular A-63 stipulated a 15-day response period for committee establishment charters. GSA's interim rule set a goal of responding to charter requests within 15 days if possible. CMS is using the 15-day response period as an assurance of prompt attention rather than as a rigid time commitment.

As illustrated below, of 50 establishment/reestablishment requests in FY 1983, 42 exceeded a 15-day response time, and, of these, 21 exceeded 30 days. Also, of 86 renewal requests, 60 exceeded 15 days and 21 exceeded 30 days.

CMS Timeliness in Reviewing FY 1983 Chartering Requests

Response Time (Days)	Number of Charters		
	Establish/Reestablish	Renewal	Revised
15 or less	8	26	4
16 - 20	6	5	-
21 - 30	15	34	2
Over 30	21	21	1
	50	86[a]	7

[a]Renewal requests for FY 1983 included an additional 49 requests which were from one agency and were received by CMS over a period of several months. CMS, however, decided to treat all 49 in one response; thus, we omitted these from our calculations.

ENCLOSURE

ENCLOSURE

4. Question

"Please explain for the Subcommittee the process for reviewing charter renewal requests. What assurance do we have here in Congress that when an advisory committee completes its work it is disbanded and goes out of business?"

Response

When an agency proposes to establish, reestablish, or renew an advisory committee, the agency head is required by the FACA to consult with CMS. The CMS response takes the form of a concurrence or nonconcurrence. This consultation takes place on a chartering request from the agency head describing the nature and purpose of the advisory committee, including an explanation of why the functions of the committee could not be performed by the agency or by an existing committee. The charter also describes how the agency plans to attain balanced membership on the committee. CMS depends on OMB budget examiners for assistance in overseeing the establishment of advisory committees. This assistance is essential because CMS cannot duplicate OMB's knowledge of agency programs to judge whether or not a committee is needed. If CMS--after receiving OMB's input--concurs with the charter, the agency head, in accordance with the act, certifies in the Federal Register that the committee is in the public interest in connection with the agency's statutory duties. The consulation process does not apply to committees authorized by statute or by the President. Charters for the agency-established committees must be renewed every two years.

CMS concurrence or nonconcurrence with agency charters does not constitute a veto power. The final determination of whether or not to proceed with a committee is to be made by agency heads. However, if an agency established a committee despite CMS nonconcurrence, CMS would make specific reference to this in its periodic reports to the President, OMB, and the Congress.

If agency heads, OMB, and CMS fulfill their assigned committees management functions, unneeded advisory committees at the agency level will be disbanded appropriately. GSA does not have comparable control, however, over the majority of committees which are established by statute. Section 5 (a) of the act requires congressional committees to review the activities of advisory committes under their jurisdiction.

Senator DURENBERGER. Next we will have a panel of J. Clay Smith, Jr., chairman of the Select Committee on the Federal Advisory Committee Act for the Federal Bar Association; and John Buchanan, senior associate, the Kettering Foundation.

If you have written statements, which I believe you do, they will be made a part of the record, together with the appropriate attachments thereto. I would hope that you would each be able to limit your summaries to approximately 5 minutes.

TESTIMONY OF J. CLAY SMITH, JR., CHAIRMAN, SELECT COMMITTEE ON THE FEDERAL ADVISORY COMMITTEE ACT, FEDERAL BAR ASSOCIATION, ACCOMPANIED BY MARY ANNE BEATTY AND MICHAEL H. CARDOZO, MEMBERS, FEDERAL BAR ASSOCIATION, SELECT COMMITTEE ON FACA; JOHN BUCHANAN, SENIOR ASSOCIATE, KETTERING FOUNDATION, ACCOMPANIED BY RICHARD A. WEGMAN

Mr. SMITH. Mr. Durenberger, members of the committee, I am J. Clay Smith, Jr., past national president of the Federal Bar Association, professor of law at Howard University, and chairman of the FBA's Select Committee on FACA. With me at the table are two other distinguished committee members: Mary Anne Beatty and Michael Cardozo.

We very much appreciate the opportunity to share with you this afternoon our views on the implementation of the Federal Advisory Committee Act.

Recognizing the time limitation imposed by the committee, at this time I wish to formally submit my prepared remarks for the record and briefly summarize the points of my testimony on behalf of FBA. Mrs. Beatty, Mr. Cardozo, and I are prepared to respond orally to any questions now or to respond in writing before the record is closed.

We have essentially eight points, and I will try to be as brief as possible. The first deals with compensation of advisory committee members.

We oppose GSA's interim regulations providing that agencies should not compensate advisory committee members for their services, but that in exceptional cases an agency head may contract for the services of a specific consultant. We believe that the old rule is more reasonable. The old rule allowed the members of an advisory committee to receive a uniform honorarium. Under the current rule, an agency head has to appoint advisory committee members as consultants. Now, what is wrong with this scheme? Simply stated, we believe it costs the Government more money.

The act calls for uniform pay schedules for advisory committee members. However, the manner in which the act is presently being administered makes it possible, based on income and qualifications, for disparate fees to be paid to advisory committee members.

For example, a college professor may receive less than a corporate executive because their salary scales are different. The FBA believes that a uniform fee system for all should be the general rule. We believe that the fee schedule should be established by the agency head as opposed to consultants scheduled on an exceptional basis.

The bottom line of our recommendation is that it reduces the paperwork requirements and paper justifications necessary to implement the present exception.

In sum, the noncompensation policy will prove to be a divisive factor within the committee's membership if some members are not paid and others are paid because they held out for compensation.

We further believe that the policy will tend to skew membership in favor of those who are financially able to participate or who are supported by organizations having a vested interest in the outcome of agency business. We do not believe that this was the purpose of FACA.

Our bottom line is we believe an expression by Congress of approving compensation as contemplated by the act would significantly encourage the policy which was promulgated in Circular A–63, which is a part of our testimony as attachment D.[1]

A second point deals with the placement of the Committee Management Secretariat. Briefly, we recommend that the Committee Management Secretariat be moved from the National Archives and Records Service, which is referred to as NARS of GSA, to the Management Division of OMB.

We take this position because of OMB's predominant role in advisory committee management, exemplified by its review of committee charters, renewals and budgets. Also, the consultation process between an agency head having to wait for NARS–OMB dialog is unreasonably time consuming.

Our third point deals with consultation with the Committee Management Secretariat. We believe that the role of CMS in the establishment and renewal of advisory committees should be clarified. I won't read section 9(a) of the act throughout, but really we are talking about the word consultation as opposed to concurrence. We submit that the word consultation should not be interpreted by GSA to mean concurrence. An agency should be, and is, free to proceed with the plans to establish a committee after it has consulted with the Committee Management Secretariat.

I would like to refer now to page 9 of my testimony, where we recommend that GSA give its concurrence, recognizing that the committee in question is essential and in the public interest, whenever the charter meets the requirement set forth in section 9(c) of the act. Concurrently, the agency should publish the notice of establishment in the Federal Register as required by section 9(a)(2). If this were done, 3 weeks could become the standard for the approval of committee charters.

We further recommend that OMB budget examiners conduct their review of the justification for a committee when a committee's charter is renewed every 2 years. By that time the advisory committee and the Federal agency should have developed a record of accomplishment by the committee that will help determine whether or not the committee is essential and in the public interest.

The other point is the limitation of the size of the advisory committee. Before I move there, we urge that GSA acknowledge in the regulation the authority of agencies to proceed to establish advisory committees without GSA concurrence in the final FACA rules.

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[1] See p. 104.

We also believe that there should be allowed a one-time meeting rule. That is to say presently, and I think GSA testified, if plaintiffs have challenged persons and organizations for having met on a one-time basis as being contrary to the intent and purpose of FACA, the Federal Bar Association believes that a practical approach would be to allow a one-time meeting without having to charter the organization as a committee. This would certainly save a lot of money, time, and give some flexibility to the agency head.

We would also recommend that notice of such meetings be published in the Federal Register so that the public would have an opportunity to participate and be present. This Government is large and complex. Meetings are necessary. But we don't believe that every meeting should have to be looked into on an advisory committee status. But we do believe that the public ought to, one, know about it and, two, should be allowed to participate.

Senator DURENBERGER. What is a one-time meeting? What are you talking about?

Mr. SMITH. The testimony, I believe, of GSA indicated that some of the public interest groups have challenged one-time meetings. That is when groups come together and meet with an agency head and give advice to the agency head, it could come within the confines of the requirements of FACA. So what we are suggesting is: let's be practical in Government and allow the one-time meeting.

Many agency heads, and I was one myself, as acting chairman of the Equal Employment Opportunity Commission, sometimes emergencies come up and you really don't have time to go through all of this paperwork. But sometimes you can plan a meeting 2 or 3 weeks in advance.

It seems to me if you can give 7 days' notice, 15 days' notice, put it in the Federal Register, the public can participate—you get the point.

Thank you very much.

Senator DURENBERGER. Thank you very much. As I indicated, your complete statement, as well as the material attached thereto, will be made part of the record. We appreciate your effort on our behalf.

Mr. SMITH. Thank you very much.

Senator DURENBERGER. Our next witness was already introduced, Mr. Buchanan. It looks like Dick Wegman is here with him, Richard A. Wegman, on behalf of the Charles F. Kettering Foundation.

Mr. BUCHANAN. Thank you very much.

Senator DURENBERGER. You know what lights mean. But you may proceed.

Mr. BUCHANAN. On behalf of the Kettering Foundation and our president, David Matthews, we are pleased to respond to Senator Danforth's request for our testimony in this hearing. This is a subject of great interest to us. We have a longstanding interest in problems of Government, and especially in public participation in the policymaking process, so much so that we have completed recently an indepth study on the subject of Federal advisory committees.

The report, which is entitled "The Utilization and Management of Federal Advisory Committees," I believe is in the possession of the committee. The author of that report is my colleague, Richard Wegman, who went from the professional staff of this committee to be codirector of President Carter's Commission on the Agenda for the Eighties. I would turn to him for the bulk of our testimony.

Senator DURENBERGER. Thank you. Dick, welcome back.

Mr. WEGMAN. Thank you, Senator; delighted to be here. It is a welcome opportunity to sit on this side of the table for a change and see what it is like.

Senator DURENBERGER. Too bad we can't give you an hour like everybody else. [Laughter.]

Mr. WEGMAN. I know what it is like to have a tight schedule, so I will try to keep my remarks very brief, Senator Durenberger.

The Kettering Foundation prepared a report on Federal advisory committees that was commissioned in 1981. We were asked to do a broad-scale survey of advisory committee members and officials with advisory committee responsibilities in the Federal Government.

We surveyed about 60 committee management officers in the Federal Government and sent questionnaires to some 200 advisory committee members. These are people who were currently serving and also people who had formerly served.

We looked into a number of the topics that have been touched on today: the fair balance and open meetings requirement of the Federal Advisory Committee Act; the ad hoc committee issue that the Federal Bar Association was testifying on a few moments ago; the question of political qualifications; the functioning of the General Services Administration and its relationship to OMB; and the general chartering requirement.

I won't go into all of the recommendations, but I would like to touch on just two.

In the fair balance requirement area, we did feel that the question of compensation is relevant. If members are compensated on some committees and on other committees are not compensated, you could get a skewing of membership. For example, if compensation is unavailable, an officer of a major corporation whose time is otherwise compensated may have no difficulty serving and participating actively on an advisory committee, whereas a private citizen who may not be able to afford to donate his or her time may be a member of the advisory committee but be unable to participate effectively. So the compensation issue does tie into the fair balance question.

Second, I did want to mention that the delay in the chartering process can sometimes lead Federal agencies not to go through it and, as a result, not to charter a committee, not to use Federal advisory committees at all. We do recommend in the report that GSA adhere strictly to the 15-day requirement that is specified in the act.

I will certainly wrap it up here. I know you have a vote.

Senator DURENBERGER. Anything else you want to say? You can talk until the five bells come on.

Mr. WEGMAN. No. Those are two of the major points I wanted to cover. I know how tight your time is. Thank you very much.

Mr. BUCHANAN. If I could simply add a footnote. We would be pleased to respond for the record to questions. Our experience with this subject not only this report and study, but also an earlier conference held in 1981 on this subject, looking at the problems and issues of advisory committees. We sent the report on that conference out to some 25,000 people who had formerly served on these committees. Within a month we received back responses from 3,000 of them, all talking about the problems but supportive of the idea.

In 1983 we held with Johns Hopkins a conference at the Wye Plantation comprised of the former chairmen of Presidential advisory committees, like Milton Eisenhower and Ben Civiletti. They talked about problems, but they reinforced the idea that this is a useful mechanism, a good vehicle for bringing the public into the policy-making process. So I wanted to end with that footnote and, if I may, with the words of David Matthews, our president, in speaking of advisory committees. He said:

> This kind of participation has worked to add a new dimension to the precept that governments exist by the consent of the governed. Informed participation, not simply participation, is the cornerstone of representative democracy.

Senator DURENBERGER. Thank you very much.

Mr. WEGMAN. Could I just introduce Shelly Weinstein, who is a former high official in the Department of Energy and now heads the Washington office of the Kettering Foundation, here with us as well?

Senator DURENBERGER. Thank you very much. I appreciate your being here.

[The prepared statements of Mr. Smith (with attachments) and Mr. Wegman, with responses to written questions submitted by Senator Roth, follow:]

TESTIMONY OF THE

FEDERAL BAR ASSOCIATION SELECT COMMITTEE

ON THE FEDERAL ADVISORY COMMITTEE ACT

BEFORE THE

UNITED STATES SENATE COMMITTEE ON GOVERNMENTAL AFFAIRS,

SUBCOMMITTEE ON INFORMATION MANAGEMENT AND REGULATORY AFFAIRS.

JUNE 21, 1984

FEDERAL BAR ASSOCIATION

SELECT COMMITTEE ON THE FEDERAL ADVISORY COMMITTEE ACT

Dr. J. Clay Smith, Jr. (Chairperson)

Mary Ann Beatty

Michael H. Cardozo

Stephen Chapple

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Ronald Martinson

Michael Mitchell

Brian C. Murphy

Alex Naimon

Dale Schmidt

Gerald Sturges

Robert Tarr

Richard A. Wegman

Cecelia Wirtz

Lynne K. Zusman

I am J. Clay Smith, Jr., Chairperson of the Federal Bar Association (FBA) Select Committee on FACA. With me are Mary Ann Beatty and Brian C. Murphy, members of the FBA Select Committee. We very much appreciate the opportunity to share with you this morning our views on the implementation of the Federal Advisory Committee Act (FACA).

Introduction

Nearly twelve years have passed since the enactment of FACA (Public Law 92-463), and we feel that it is time for a good, hard and constructive look at the way the Act has been carried out. While much good has been accomplished during those twelve years in opening up citizen participation in the affairs of the Federal Government, we feel that much remains to be done.

We consider implementation of FACA to be a matter of great significance for the Executive Branch. Federal advisory committees are involved in giving advice on programs that undoubtedly involve many billions of dollars. As the Eleventh Annual Report of the President to Congress stated (covering calendar year 1982, dated June 16, 1983), "advisory committees afforded a unique opportunity for over 19,000 private citizens of all backgrounds to provide valued and needed counsel to Federal officials in establishing policies and improving operations of the government."

The Federal Advisory Committee Act provides the framework for an excellent Federal advisory committee management system, which fosters more and better public citizen participation in the development of government policy and practice, at minimal cost, while ensuring openness and accountability, and while making extraordinarily valuable contributions, ranging

from the eradication of smallpox to rescue of the social security system. Because the work of advisory committees is of such great importance to the efficient functioning of the U.S. Government, the regulations governing these committees are significant regulations meriting close scrutiny.

We are concerned about implementation of the Act in a number of areas, including compensation of committee members and the paperwork burden associated with implementation of the Act. We also feel that one-time meetings should not be covered, and that consideration should be given to exempting state and local officials and their designated representatives from coverage.

In April 1983, the General Services Administration published an interim rulemaking on FACA, with comments invited prior to final rulemaking (48 Federal Register 19324, April 28, 1983). (See Attachment A.) The FBA Select Committee on FACA on July 26, 1983 provided extensive comments on the interim regulations (see Attachment B). Over a year has passed without publication of a final rulemaking. Since a number of the provisions in the interim rulemaking were controversial and the subject of confusion, a final rulemaking is necessary very soon.

A major point of disagreement between the Federal Bar Association and GSA was over the question of compensation of advisory committee members.

A. Compensation of Advisory Committee Members

GSA's interim regulations provide that agencies should not compensate advisory committee members for their service on advisory committees, but

that, in exceptional cases, an agency head may contract for the services of a specific consultant. We believe that this provision violates both the letter and spirit of FACA and it should be withdrawn.

We are aware that the Office of Management and Budget also disagrees with GSA on the issue of compensation. (See Attachment C.)

The no-compensation policy will prove to be a divisive factor within the committee's membership if some members are not paid and others are paid because they "held out" for compensation. Furthermore, the cost-effectiveness of such a provision is questionable, in view of the extra staff time and resources that will be spent to find experts who are willing to volunteer their services. This policy will tend to skew membership in favor of those who are able to participate at their own expense or who are employed by relatively wealthy organizations that have a vested interest in the outcome of the debate. Less well-funded organizations may find it difficult to spare staff members for service on advisory committees for activities not directly related to a committee's purposes. The policy of non-compensation constitutes a giant step backward.

Since the Act, however, expressly contemplates compensation in appropriate cases, the Executive Branch can remedy this problem without legislation. We suggest a return to the administrative framework for compensation provided in OMB Circular A-63, as revised in 1974 (see Attachment D). An expression by the Congress of approval of compensation as contemplated by the Act would significantly encourage that policy.

1. Compensation of Advisory Committee Members as Special Government Employees

Advisory committee members who are paid acquire status as special

government employees (SGE's) by virtue of their appointment as committee members and are subject to the conflict of interest requirements that apply to all SGE's. Advisory Committee Members who are unpaid still may acquire status as SGE's if they serve in a personal capacity instead of representing a special interest. If they represent others, unless they are paid, they do not acquire status as SGE's. The advisory committee appointment process and method of operations obviate some of the conflict of interest concerns when they are conducted in full accord with FACA. (For a discussion of the application of Federal conflict of interest laws to advisory committee members, see the memorandum from J. Jackson Walter, Director of the Office of Government Ethics, to the heads of departments and agencies of the Executive Branch, dated July 9, 1982, titled "Members of Federal Advisory Committees and the Conflict-of-Interest Statutes": Attachment E).

GSA's no-compensation rule for advisory committee members apparently was based on a notion of volunteerism. GSA's proposal to appoint committee members as consultants when an agency cannot identify members willing to serve without compensation reveals a lack of understanding about consultants and SGE status in relation to advisory committees. However, assembling and hiring consultants who have been cleared of conflict of interest concerns does not create the equivalent of, or a substitute for, a properly established advisory committee. Several years ago, HEW dissolved its Pharmaceutical Reimbursement Advisory Committee for allegedly insoluble conflict of interest considerations and substituted individual consultants working under contract. However, the advisory committee format, with public meetings, and members excusing themselves from consideration of certain drug products, as necessary, would have been a superior approach in every respect.

For these reasons, we respectfully suggest that this Subcommittee determine whether FACA and/or the conflict of interest statutes should be amended to clarify the SGE status of advisory committee members.

B. The Paperwork Burden Imposed by FACA

1. Placement of the Committee Management Secretariat

We feel that some of the problems in the implementation of FACA stem from the placement of the committee management secretariat (CMS) in the National Archives and Records Service (NARS) of GSA. The Act prescribed location of CMS within the Office of Management and Budget and it functioned at OMB until President Carter's Reorganization Plan No. 1 (1977) transferred it to GSA. We understand that it was moved from OMB to save a few positions from the OMB headcount.

Despite the movement of CMS to NARS at GSA, OMB's important role in advisory committee management continues in its review of committee charters, renewals and budgets. The consultation process between GSA/NARS and OMB can be cumbersome and very time-consuming, in some instances delaying the establishment of needed advisory committees for many months. We recommend that CMS be moved out of NARS to a more appropriate place, preferably in a management division of OMB.

2. "Consultation" with the Committee Management Secretariat

The role of CMS in the establishment and renewal of advisory committees should be clarified. Section 9(a) of the Act provides that:

> No advisory committee shall be established unless such establishment is...(2) determined as a matter of formal record by the head of the agency involved after consultation with the Director, with timely

> notice published in the Federal Register, to be in the public interest in connection with the performance of duties imposed on that agency by law.

"Consultation with the Director" should be interpreted to mean what it says. "Consultation" does not mean "concurrence," despite its interpretation to that effect in GSA's Notice of Proposed Rulemaking which appeared in the Federal Register on August 21, 1980 ("The Agency head must obtain the Secretariat's concurrence before establishing or using an advisory committee...."). At the time of the proposed rulemaking, agency officials objected strenously to this provision, as well they should have. The determination of whether or not a committee ought to be established should be reserved to the agency itself, and not to an organ like GSA's Committee Management Secretariat.

An agency should be (and is) free to proceed with its plans to establish a committee after it has "consulted" with the committee management secretariat. The GSA guidelines or regulations should make this clear by stating that the agency may proceed after a specified interval following notice in the Federal Register and a request to the secretariat for "consultation." We suggest a 15-day interval.

The interim GSA rulemaking, published in the Federal Register on April 28, 1983, sought to clarify this untenable position by a statement of limitation in the preamble to the rule.* However, such a statement should appear in the text of the rulemaking, and not in a preamble to be lost when the rulemaking is published in the Code of Federal Regulations.

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* The statement in question follows:

Several commenters raised questions as to GSA's role in the establishment

Because of the widespread confusion, it is appropriate for the Congress to clarify the statutory meaning of the word "consultation." In spite of GSA's attempt at clarification, the procedures designed to implement the required "consultation" process leave much to be desired. Because the GSA Committee Management Secretariat does not have adequate staff resources to make informed, comprehensive reviews regarding Government-wide proposals to establish committees, they have continued to send the requests to the OMB budget examiners who are better informed. The budget examiners have a heavy workload and do not give this type of request high priority. Therefore, the turnaround time usually exceeds the 15 days which was once proposed by OMB as the norm (see OMB circular A-63, Attachment D) for this process. In fact, one agency has experienced a timelag of one to nine months for completion of the GSA/OMB consultation process and another agency was told to hold all of its requests for establishment and submit them all during one specific month each year. These delays impose great and unnecessary burdens on an agency head committed to meeting Congressional or other deadlines for the creation or re-chartering of advisory committees. Quite often, speedy establishment of a committee is essential to the success of a project, especially when a hazard to health or safety is involved (e.g., the Three Mile Island advisory committee).

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of advisory committees. Some commenters objected to the requirements for GSA concurrence before an agency head can establish, use, or renew an advisory committee under general agency authority.

We recognize the sensitive nature of this particular issue, that is, the role to be played by GSA in the establishment of an advisory committee. GSA is fully aware that an agency head, not GSA, "determines as a matter

The White House has placed more emphasis on reducing the number of advisory committees than on the need for and the merits of creating new committees. This discourages self-policing by agencies of underground, de facto advisory committees because, once they are discovered and the agency attempts to charter them, the agency may be unable to obtain OMB concurrence.

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of formal record" (after consultation with the Administrator) that the establishment of an advisory committee is "in the public interest in connection with the performance of duties imposed on that agency by law."

However, GSA is responsible for "all matters relating to advisory committees" (5 U.S.C. App. I) and a meaningful rather than a pro forma consultation role is necessary to fulfill this responsibility. This conclusion is reinforced by the language in sec. 9(a)(2) of FACA, which provides that an advisory committee cannot be established until the consultation process has taken place. In the absence of specific direction in either FACA or its legislative history as to what precisely is meant by the word "consultation," it is incumbent on GSA to determine the parameters of this process.

We have concluded to follow the consultative process as it has been performed, in the beginning by OMB and then by GSA. GSA will, therefore, continue the practice of giving notification of "concurrence/non-concurrence" in consultations received from agencies.

We do not view or interpret the words "concur/nonconcur" as implying a veto power by GSA over a determination which properly rests in the head of another agency. Rather, we interpret the word "concur" as meaning that GSA agrees the establishment of a particular committee is in accord with the terms and spirit of FACA. Conversely, a nonconcurrence would indicate GSA's opinion that the establishment of a committee is not in accord with FACA.

GSA also believes that its notification of "concurrence/nonconcurrence" to an agency head is a logical way to complete the consultation process. Such notification is GSA's means of letting the agency head know that the consultation process has been fulfilled.

In the final analysis, a nonconcurrence by GSA would not legally prevent an agency from establishing a particular committee. However, GSA in discharging its oversight function of advisory committees intends to prepare and submit periodic reports to the President, OMB, and the Congress. Our nonconcurrence in any advisory committee, therefore, would be included in these reports (emphasis added).

To encourage agencies to submit to the chartering and openness provisions of FACA, we recommend that GSA give its concurrence (i.e., recognizing that the committee in question is essential and in the public interest) whenever the charter meets the requirements set forth in Section 9(c) of the Act. Concurrently the agency could publish the notice of establishment in the Federal Register as required by Section 9(a)(2). If this were done, three weeks could become the standard time for approval of committee charters.

We further recommend that the OMB budget examiners conduct their review of the justification for a committee when a committee's charter is renewed every two years. By that time the advisory committee and the Federal agency should have developed a record of accomplishment by the committee that will help determine whether or not the committee is essential and in the public interest.

3. Limitation on the Size of Advisory Committees

GSA has provided in its interim rule that advisory committees with agency-wide missions should be limited to 25 members and committees with more narrowly defined functions or specialized areas of interest should be limited to 12 members. We do not think GSA should set an arbitrary principle for determining the size of membership, but rather it should be determined by the agency head based on the committee's purposes and objectives. Although the interim rule provides that the agency head may authorize additional members when it is determined to be necessary to the function of the committee or to achieve balanced membership, it is not cost-effective to add this additional paperwork to the already burdensome system. The agency head should have the flexibility to make this decision based on his or her evaluation of the complexity of the subject matter to be dealt with, the highly specialized expertise required, and the time allotted to complete the activity. While committees with more than 25 members may be more

difficult to manage, establishing a larger umbrella committee is often an efficiency measure which saves the cost of setting up separate committees and staffs. The larger committees sometimes do their staff work through smaller panels or subcommittees which report to the parent committee.

There is some confusion among agencies about the need to obtain a separate charter for a subcommittee of an advisory committee, and the standards for chartering subcommittees should be clarified(See Attachment B, p. 3).

4. Annual Report of the President

The Annual Report of the President on Federal Advisory Committees, in which the President reports to the Congress on the fiscal year's advisory committee activities of the Executive Branch, was due to Congress in January 1984. It is needed now. We understand that there have been substantial concerns within the Federal Advisory Committee community as to the accuracy of portions of the last Annual Report, especially as to the cost of advisory committees.

To assist in correcting government-wide inconsistencies in reporting the costs of advisory committees, the GSA Committee Management Secretariat established a Subcommittee on Uniform Cost Reporting on September 26, 1983 (see Attachments F and G). The Subcommittee found that some agencies, which were shown as "big spenders" in the Annual Report, had included the cost of items such as building rental and utilities. However, other agencies, which had indicated minimal expenditures, had not included the cost of secretarial, clerical and administrative personnel. One of the

obvious discrepancies was reflected in the Small Business Administration's (SBA) statistics, which indicated that 132 meetings were held with two years of staff support, whereas the Nuclear Regulatory Commission (NRC) held 137 meetings with 54 years of staff support. However, the scientific and technical reports prepared and reviewed by the scientific committees of NRC are not really comparable to the activities of the SBA committees. The Annual Report is amiss in comparing apples to oranges. This kind of reporting does not provide the public or the Congress with enough information to draw appropriate conclusions about whether the taxpayers are getting their money's worth from these committees.

We believe last year's Annual Report has been the basis for unjustified criticism of the value of advisory committees by not providing the whole story. Committee members are often involved in a great deal more substantive work than just attending meetings in some departments. Criticism of committees that spent money but never met can easily be explained when one realizes that the sponsoring agency has sent the members on site visits, or has given them research projects to conduct and reports to write. GSA's Committee Management Secretariat misplaced the proper emphasis when it vowed to end "wasteful use of government resources" without making a more thorough investigation into how the departments spent the money.

The Subcommittee on Uniform Cost Reporting submitted its recommendations to the GSA Committee Management Secretariat on May 24, 1984, in the hope that GSA will be able to revise the new cost reporting form before the data collection starts this fall so that the next Annual Report covering fiscal year 1984 will be accurate. To ensure uniformity in identifying the costs to be counted, the Subcommittee recommended resumption of the previous OMB

practice that agencies not include indirect costs or staff support services that collectively total less than one-fourth of a staff-year. Until all agencies report their costs by a uniform method, the statistics in the Annual Report will not be an accurate reflection of advisory committee expenditures. Thus, the conclusion of Senator Nickles, embodied in S. 2127, that legislation is necessary to ensure better cost management of Federal Advisory Committees, likely was based on some very misleading data.

C. Exemptions From Coverage

1. Administrative Exemption of One-Time Meetings

The Act is silent as to whether advisory groups meeting one or a few times should be covered. The definition of "advisory committee" should not include any group of individuals meeting with government officials at any level if (1) the group is convened for a one-time session; (2) the participants are separate individuals as distinct from members of a previously arranged, organized group; (3) the meeting is not structured into a "committee" with, for example, a presiding member or a continuing assignment and membership; and (4) the group is convened more with spontaneity than deliberate advance planning. (This position has been endorsed in a study entitled, "The Federal Advisory Committee Act in Operation," prepared in 1980 for the Administrative Conference of the United States, by Michael H. Cardozo. See 33 Administrative Law Review No. 1, Winter 1981; pp. 162 and especially pp. 26-28 and 54.)

We recommend that, even for one-time meetings, the openness provisions of the Act should be applied. There should be advance notice published in the Federal Register (We recommend 15 days); the public should normally be able to

attend and participate in the meeting; and minutes should be taken and made available for public review after the meeting.

2. Exemption of State and Local Governments and Their Interest Groups

We recommend that groups of elected officials of state and local governments and their designees, including their national organizations, should be exempted from coverage by FACA. Designees of elected officials, such as appointed officials and staff members of national organizations, should only be exempted where they are acting officially at the direction of the elected officials, pursuant to policies adopted by elected officials and where their activities are financed with public monies.

Elected officials of state and local governments and their designees are in a constitutional partnership with the Federal government and have the responsibility to consult with Federal officials at the earliest stages of policy development and to work together with Federal officials in program administration. We are concerned that current constructions of FACA as to one-time or ad hoc meetings are serving to restrict severely the communications needed among Federal program officials and the state and local elected officials and their representatives who are charged with implementing Federal programs.

A statutory basis for joint efforts among Federal, state and local governments can be found in the Intergovernmental Cooperation Act, 42 U.S.C. §4201 et.seq., where the Congress has required that:

> All viewpoints - national, regional, State and local - shall, to the extent possible, be fully considered and taken into account in planning Federal or Federally assisted development programs and projects. 42 U.S.C. §4321(b).

The national organizations of the elected officials of general purpose state and local governments are expressly recognized in Federal law in the Act establishing the Advisory Commission on Intergovernmental Relations. 32 U.S.C. §4274(a) (4)-(7).

There are good reasons for the Congressional interest in the need for the free flow of information and ideas among the Federal, state and local governments. Something in excess of $80 billion of Federal monies are spent each year by state and local governments.

When mayors, governors and other elected officials attempt to meet with Federal officials, they are partners in the governmental process, representing the same constituents as the Congress and the Administration. Like Congress and the Administration, they are ultimately responsible to the electorate. Congress has entrusted them with the administration of billions of dollars of Federal monies. The associations that represent these officials in Washington perform an important role in maintaining communications among the partners in the intergovernmental system.

State and local governments which implement Federal programs should, through their elected officials or officers, have access to the regulation writing processes of Federal agencies and should be able to consult with Federal agencies regarding the administration of programs that they implement. State and local governments should be able to maintain their ability to undertake these activities through their national associations.

Conclusion

We appreciate the opportunity to share our views with the Subcommittee on Information Management and Regulatory Affairs. Oversight by the Congress is,

in our view, necessary and welcome.

We would also like to express our appreciation to the Charles F. Kettering Foundation for its comprehensive Report on the Utilization and Management of Federal Advisory Committees (authored by Richard A. Wegman, June 1983). An update of that report would be of great benefit to the Congress, the Executive Branch, and the public in setting the Federal advisory committee system back on track.

Thank you very much.

ATTACHMENT A

GENERAL SERVICES ADMINISTRATION

National Archives and Records Service

41 CFR Part 101-6

Federal Advisory Committee Management

AGENCY: National Archives and Records Service, General Services Administration.

ACTION: Interim rule, with comments invited prior to final rulemaking.

SUMMARY: This interim rule provides administrative and interpretive guidelines and management controls for Federal agencies concerning the implementation of the Federal Advisory Committee Act, as amended (5 U.S.C. App. I) (hereinafter "the Act"). In a previous issue of the Federal Register, GSA published a proposed rule on the management of Federal advisory committees and requested comments. The proposed rule was intended to provide Federal agencies with guidance and instructions for implementing the Act. Comments received have been considered in formulating this interim rule, which also has been reorganized to include new policy guidance to Federal agencies. Comments are invited on this interim rule prior to its publication as a final rule.

DATES: Effective date: April 28, 1983. Comments must be received by: July 27, 1983.

ADDRESS: Comments should be submitted to the Special Assistant to the Archivist (NX), National Archives and Records Service, Washington, DC 20408, Attention: FPMR Comments.

Comments will be available for examination at the Committee Management Secretariat, Room G-5, 9th Street and Pennsylvania Ave., NW., Washington, DC.

FOR FURTHER INFORMATION CONTACT: Ron Martinson, Special Assistant to the Archivist, Committee Management Secretariat, (202) 523-4864.

SUPPLEMENTARY INFORMATION:

Background

GSA's authority for administering the Act is contained in section 7 of the Act and Executive Order 12024, (42 FR 61445, 3 CFR, 1977 Comp., p. 158). Under Executive Order 12024, the President delegated to the Administrator of General Services all the functions vested in the President by the Act, as amended, except that of reporting annually to the Congress, and redelegated to the Administrator the responsibility for the preparation of the annual report required by section 6(c) of the Act.

Originally, the responsibility for all matters relating to advisory committees was placed in the Office of Management and Budget (OMB), which issued Circular A-63 (March 27, 1974) and A-63 Transmittal Memoranda 1, 4, and 5.

In light of GSA's experience in administering the Act, GSA is issuing this interim rule, which consolidates many features of these OMB Circulars with existing GSA reporting requirements. The rule also provides additional procedures and guidance for Federal agencies.

Prior Comments

GSA issued an advance notice of proposed rulemaking (44 FR 66852, November 21, 1979) and a notice of proposed rulemaking (45 FR 55769; August 21, 1980). As a result of the proposed rule, 23 comments were received, and all have been carefully considered in developing this interim rule.

One of the major issues raised by commenters was the extent of applicability of the Act. Some commenters believe, as a matter of general policy, that advisory groups which are not formally structured, which do not have a continuing existence, which meet to deal with specific issues, and whose meetings do not constitute an established pattern of conduct should not be covered under the Act. One commenter asserted that the case law does not preclude administrative interpretation of the Act in limiting the definition of "Advisory committee" and also limiting coverage of "ad hoc groups." Another commenter favored a specific exemption for "ad hoc groups," based on Marblestone, (The Coverage of the Federal Advisory Committee Act, 35 Federal Bar Journal, 119). These comments were received before the decision in *National Resources Defense Council* v. *Edwards*, 2 GDS ¶ 82,070 (D.D.C., 1981). This rule reflects our judgment that the exclusion of certain non-recurring meetings from the Act's coverage is fully consistent with the statute, its legislative history, and judicial interpretation. The need for this flexibility was recently recognized in *National Anti-Hunger Coalition, et al.* v. *Executive Committee of the President's Private Sector Survey on Cost Control, et al.*, Civil Action No. 82-3062 (D.D.C., Feb. 24, 1983). In wrestling with FACA's imprecise language, the court stated, "The Court's task in the absence of clear indications in the statute or its legislative history to the contrary, must be to achieve a common-sense interpretation. Congressional concerns must be accommodated in a manner that produces a constitutional result, in this instance to leave the President with substantial freedom to formulate policy recommendations free from excessive intrusion." The interim rule provides guidance on those meetings between Federal officials and non-Federal individuals which do not fall within the scope of the Act, and for which a charter and consultation with GSA is not required.

Another issue raised was whether the Act applies to committees "utilized" by agencies. One commenter contended that the proposed rule failed to distinguish committees "established" by agencies from those "utilized" by agencies. That commenter also believed that the Cox decision (*Center for Auto Safety* v. *Cox*, 580 F.2d 689 (D.C. Cir., 1978)) would make the Act inapplicable to "utilized" committees. GSA has reviewed the *Cox* decision and does not agree with that interpretation. Subsequent judicial precedent supports GSA's position. The interim rule does define a "utilized" committee.

In providing guidance on those groups and meetings not subject to FACA, and on utilization, GSA is in general agreement with the following recommendation of the Administrative Conference of the United States.

> The most serious problems regarding the coverage of FACA have involved the applicability of the Act (a) to groups convened by agencies, on an ad hoc basis, without formal organization or structure or continuing existence, to obtain views on particular matters of immediate concern to the agency, and (b) to privately established groups whose advice is "utilized" by an agency.
>
> a. Uncertainty as to the applicability of FACA to one-time or occasional meetings between ad hoc groups and government officials has tended to discourage useful contacts with the private sector. It is impractical to require such meetings to conform with the Act's requirements regarding chartering, advance notice, and structure of the committee. The Administrative Conference believes that the Act is not applicable to ad hoc, unstructured, noncontinuing groups and that GSA's guidelines should make this clear. Coverage of such groups would not further the purposes of the Act.
>
> b. The conference believes that the definition of "advisory committee" is limited to committees either established by government action or affirmatively supported and "utilized" by the government through institutional arrangements which amount to the adoption of the groups as a preferred source of advice. GSA's guidelines should make this clear.

Thus, under the interim rule, the President or Federal official would "utilize" a committee when that individual recognizes, uses, or intends to use the committee as a preferred source of advice on specific, identified government policy within that individual's scope of responsibility. Such committees, although they may be informal, have an organizational structure, a stable membership and, generally, a continuing existence. They meet to present recommendations developed by that committee, as distinguished from meetings whose attendees respond as individuals.

While this interim rule provides guidance and examples of meetings with groups of individuals which are not subject to the Act, agencies are cautioned that the group can become subject to the Act if a pattern or "track record" develops whereby an agency seeks advice from the group in such a way that it becomes a preferred source of advice.

Questions were raised as to when all the requirements of the Act apply to subcommittees. One commenter suggested a clarification of the definition of subcommittee, so that the establishment of subcommittees is not used to circumvent the principles of the Act.

Another commenter, however, suggested that a subcommittee is not required to consult and charter separately if it has functions related to the functions of the parent committee, and reports to the parent committee. The Court's reasoning in *National Anti-Hunger Coalition* v. *Executive Committee* supports the latter recommendation by emphasizing that the Act's requirements apply to committees which provide advice and recommendations directly to the President or Federal official, and as opposed to the parent committee. Therefore, the requirements for consultation and chartering of subcommittees which appear in § 101–6.1007(a)(3) apply when a subcommittee functions independently of the parent committee such as reporting directly to the President or agency official rather than to the parent committee.

Another commenter, on behalf of a consortium of State and local interest groups, requested an administrative exemption from FACA coverage for State and local officials and their representatives. Although this comment has merit, GSA has concluded this exemption would require amendment of the Act.

One commenter suggests that there be a definition of "meeting" so it would be clear when an agency must comply with procedures under the Act. It is GSA's position that informal meetings or gatherings of advisory committee members in which substantive committee business is discussed are subject to the provisions of the Act. GSA recognizes the administrative difficulty in this area and has concluded that the sponsoring agency can best determine whether a specific gathering of advisory committee members constitutes an advisory committee meeting. GSA believes, however, that meetings of two or more advisory committee members convened to gather information or conduct research for the committee to analyze relevant issues and facts, or to draft option papers for consideration by the advisory committee do not constutute a meeting of the advisory committee subject to the requirements of the Act. *National Anti-Hunger Coalition* v. *Executive Committee*, supra.

Several commenters raised questions as to GSA's role in the establishment of advisory committees. Some commenters objected to the requirement for GSA concurrence before an agency head can establish, use, or renew an advisory committee under general agency authority.

We recognize the sensitive nature of this particular issue, that is, the role to be played by GSA in the establishment of an advisory committee. GSA is fully aware that an agency head, not GSA, "determines as a matter of formal record" (after consultation with the Administrator) that the establishment of an advisory committee is "in the public interest in connection with the performance of duties imposed on that agency by law."

However, GSA is responsible for "all matters relating to advisory committees" (5 U.S.C. App. I) and a meaningful rather than a *pro forma* consultation role is necessary to fulfill this responsibility. This conclusion is reinforced by the language in sec. 9(a)(2) of FACA, which provides that an advisory committee cannot be established until the consultation process has taken place. In the absence of specific direction in either FACA or its legislative history as to what precisely is meant by the word "consultation," it is incumbent on GSA to determine the parameters of this process.

We have concluded to follow the consultative process as it has been performed, in the beginning by OMB and then by GSA. GSA will, therefore, continue the practice of giving notification of "concurrence/nonconcurrence" in consultations received from agencies.

We do not view or interpret the words "concur/nonconcur" as implying a veto power by GSA over a determination which properly rests in the head of another agency. Rather, we interpret the word "concur" as meaning that GSA agrees the establishment of a particular committee is in accord with the terms and spirit of FACA. Conversely, a nonconcurrence would indicate GSA's opinion that the establishment of a committee is not in accord with FACA.

GSA also believes that its notification of "concurrence/nonconcurrence" to an agency head is a logical way to complete the consultation process. Such notification is GSA's means of letting the agency head know that the consultation process has been fulfilled.

In the final analysis, a nonconcurrence by GSA would not legally prevent an agency from establishing a particular committee. However, GSA in discharging its oversight function of advisory committees intends to prepare and submit periodic reports to the President, OMB, and the Congress. Our nonconcurrence in any advisory committee, therefore, would be included in these reports.

GSA also intends to watch for situations in which agencies might redefine or restructure advisory committees in such a way as to exclude them from the Act's coverage and requirements. GSA will analyze these situations to determine if an agency is elevating form over substance to disguise an advisory committee which should comply with the Act. If this is the case, GSA will recommend that such groups are chartered and operate in accordance with the Act. In situations where GSA and the sponsoring agency cannot resolve the matter, GSA will identify in future reports the groups for which a charter has been recommended and no action has been taken.

Other commenters suggest that if GSA had not replied to an agency consultation letter by the end of a specific review period, GSA concurrence would be implied. We have not included this suggestion in this rule on the grounds that it is not practical. When GSA receives an agency consultation letter, it gathers pertinent information to assess the need for the committee. Occasionally, certain information is not available or provided within a specified time period. To allow a committee to come into being without that information would not be in the public interest. This interim rule provides that GSA will respond to an agency consultation letter within 15 days, if possible.

Another commenter raised the question of the role of the OMB budget examiner in the consultation process. The budget examiner's role has been integral to the consultation process since it began. When the function was transferred to GSA, OMB continued to make available the assistance of budget examiners in the consultation process.

Several commenters objected to language requiring that agencies maintain complete documentation on their advisory committees in a single location on the basis that such a requirement was administratively excessive and unreasonable. Most of the commenters on this issue suggest that GSA's language follow the language in the Act. GSA agrees and has eased this requirement.

One commenter asked that the regulation prohibit dual and multiple committee memberships in which one person serves on more than one committee in one of more agencies. That commenter believed that such multiple memberships should be discouraged in the interest of providing access by a broader number of citizens to membership on advisory committees. GSA believes that, if necessary, agencies should deal with this issue in their own regulations and procedures.

Some commenters suggested that a definition of "Independent Presidential Advisory Committee" be included in order to make clear which Presidential advisory committees receive administrative support from the Administrator of General Services. GSA agrees with this suggestion and has included a definition of an independent PAC. The duties of the Chairperson of an independent PAC are set out separately.

Several comments were made on the organization of the proposed rule and the clarity of certain terms. For example, some suggestions were offered on alternative language to describe "balanced membership." GSA has attempted to clarify in this interim rule the guidelines for balanced membership. The rule describes balance in terms of specific function to be performed by a particular committee. This is consistent with the language of *National Anti-hunger Coalition* v. *Executive Committee*, supra.

Additional Instructions

Pursuant to section 7(d) of the Act, the Administrator after study and consultation with the Director, Office of Personnel Management, is to establish guidelines with respect to uniform fair rates of pay for comparable services for members, staffs, and consultants of advisory committees. The consultation process with OPM has taken place.

Consistent with the intent of Congress and the President to control the costs of administering advisory committees, the interim rule contains a provision which states that unless otherwise required by law, or when necessary to obtain balanced membership or a particular level of technical expertise, no member of an advisory committee shall receive compensation for his or her services. In other words, unless an exception applies, compensation shall be set at zero.

GSA believes that a sufficient number of citizens of all backgrounds and qualifications can be found to provide advice and recommendations to the Federal Government through voluntary service on advisory committees.

The interim rule does provide for the reimbursement of necessary travel expenses and per diem, as well as a mechanism where agencies may engage consultants to serve as members of advisory committees when this is necessary to acquire certain technical expertise or balanced membership that cannot be satisfied solely through the appointment of noncompensated members. However, it is the responsibility of each agency to make a good faith effort to meet its membership requirements on a noncompensated basis. GSA in its oversight responsibility will include membership information in program reports and recommendations which it prepares on Federal advisory committees. The interim regulation contains no changes to present methods used by agencies regarding compensation of consultants or staff under OPM and OMB procedures.

The rules have also been amended to reflect the change in the annual agency reporting requirements from a calendar year to a fiscal year cycle brought about by Pub. L. 97-375.

Executive Order 12291

The General Services Administration has determined that this proposed rule is not a major rule for purposes of Executive Order 12291 of February 17, 1981, because it will not result in an annual effect on the economy of $100 million or more, will not cause a major increase in costs to consumers or others, and will not have significant adverse effects. The General Services Administration has based all administrative decisions on this proposed rule on adequate information concerning the need for and consequences of this proposed rule. GSA has also determined that the potential benefits to society from this proposed rule far outweigh the potential costs, has maximized the net benefits, and has chosen the alternative involving the least net cost to society.

Regulatory Flexibility Act

These regulations are not subject to the regulatory flexibility analysis or other requirements of 5 U.S.C. 603 and 604.

Effect on Other Directives

This rule replaces OMB Circular A-63 (March 27, 1974) and A-63 Transmittal Memoranda 1, 4, and 5 which have been rescinded by OMB.

List of Subjects in 41 CFR Part 101-6

Civil rights, Government property management, Grant programs, Intergovernmental relations, Surplus Government property, Relocation assistance, Real property acquisition, Federal advisory committees.

Dated: March 21, 1983.

Ray Kline,

Acting Administrator of General Services.

Accordingly, 41 CFR Part 101-6 is amended as set forth below:

PART 101-6—[AMENDED]

Subpart 101-6.10 is added to Part 101-6 to read as follows:

Subpart 101-6.10—Federal Advisory Committee Management

Sec.

101-6.1001 Scope.
101-6.1002 Policy.
101-6.1003 Definitions.
101-6.1004 What are examples of advisory meetings or groups not covered by the Act of this regulation?
101-6.1005 By what authority may an advisory committee be established?
101-6.1007 How does an agency head establish an advisory committee?
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101-6.1031 When should an advisory committee charter be amended?
101-6.1033 When should advisory committee members and staff receive compensation and expense reimbursements for committee activities?
101-6.1035 What reports are required for advisory committees?

Authority: Sec. 205(c) 63 Stat. 390; 40 U.S.C. 486(c); sec. 7, 5 U.S.C. App. 1; and E.O. 12024, 3 CFR 1977 Comp. p. 158.

Subpart 101-6.10—Federal Advisory Committee Management

§ 101-6.1001 Scope.

(a) The following regulations define the policies, establish minimum requirements, and provide guidance to agency management for the establishment, operation, administration, and duration of advisory committees subject to the Federal Advisory Committee Act, as amended. Reporting requirements which keep the Congress and the public informed of the number, purpose, membership, activities, and cost of these advisory committees are also included.

(b) The Act and these regulations do not apply to advisory meetings or groups listed in § 101-6.1004.

§ 101-6.1002 Policy.

The policy to be followed by Federal departments, agencies, and commissions, consistent with the Federal Advisory Committee Act, as amended, is that an advisory committee shall be:

(a) Established only when it is essential to the conduct of agency business. Decison criteria would include whether committee deliberations will result in the creation, elimination, or change in regulations, guidelines, or rules affecting agency business; whether the information to be obtained is already available through another advisory committee or source within the Federal Government; whether the committee will make recommendations resulting in significant improvements in service or reductions in cost; or whether the committee recommendations will provide an important additional perspective or viewpoint impacting on agency operations;

(b) Terminated whenever the stated objectives of the committee have been accomplished; the subject matter or work of the committee has become obsolete by the passing of time or the assumption of the committee's main functions by another entity within the Federal Government or the agency determines that the cost of operation is excessive in relation to the benefits accruing to the Federal Government;

(c) Balanced in its membership in terms of the points of view represented and the functions to be performed; and

(d) Open to the public in its meetings except in those circumstances where a closed meeting shall be determined proper and consistent with the Act.

§ 101-6.1003 Definitions.

"Act" means the Federal Advisory Committee Act, as amended, 5 U.S.C. App. I.

"Administrator" means the Administrator of General Services.

"Advisory Committee" subject to the Act means any committee, board, commission, council, conference, panel, task force, or other similar group, or any subcommittee or other subgroup thereof, established by statute, or established or utilized by the President or any agency official for the purpose of obtaining advice or recommendations on issues or policies which are within the scope of his or her responsibilities.

"Agency" has the same meaning as in section 551(1) of Title 5 of the United States Code.

"Committee member" means an individual who serves by appointment on an advisory committee and has the full right and obligation to participate in the activities of the committee, including voting on committee recommendations.

"Independent Presidential advisory committee" means any Presidential advisory committee not assigned by the President, or the President's delegate, or by the Congress in law, to an agency for administrative and other support and for which the Administrator of General Services may provide administrative and other support on a reimbursable basis.

"Presidential advisory committee" means any advisory committee which advised the President. It may be established by the President or by the Congress, or used by the President in the interest of obtaining advice or recommendation for the President.

"Secretariat" means the General Services Administration's Committee Management Secretariat.

"Staff member" means any individual who serves in a support capacity to an advisory committee.

"Utilized" (or used), as referenced in the definition of "Advisory Committee" of this section, means a committee or other group composed in whole or in part of other than full-time officers or employees of the Federal Government with an established existence outside the Federal Government which the President or agency official(s) adopts, such as through institutional arrangements, as a preferred source from which to obtain advice or recommendations on a specific issue or policy within the scope of his or her responsibilities in the same manner as that individual would obtain advice or recommendations from an established advisory committee.

§ 101-6.1004 What are examples of advisory meetings or groups not covered by the Act or this regulation?

(a) Any committee composed wholly of full-time officers or employees of the Federal Government;

(b) Any advisory committee specifically exempted by an Act of Congress;

(c) Any advisory committee established or utilized by the Central Intelligence Agency;

(d) Any advisory committee established or utilized by the Federal Reserve System;

(e) The Advisory Committee on Intergovernmental Relations;

(f) Any local civic group whose primary function is that of rendering a public service with respect to a Federal program, or any State or local committee, council, board, commission, or similar group established to advise or make recommendations to State or local officials or agencies;

(g) Any meeting initiated by the President or one or more Federal official for the purpose of obtaining advice or recommendations from one individual;

(h) Except with respect to established advisory committees:

(1) Any meeting with a group initiated by the President or one or more Federal official(s) for the purpose of exchanging facts or information; or

(2) Any meeting initiated by a group with the President or one or more Federal official(s) for the purpose of expressing the group's view, provided that the President or Federal official(s) does not use the group as a preferred source of advice or recommendations;

(i) Any committee which is established to perform primarily operational as opposed to advisory functions, except that such committee may be covered by the Act if it becomes primarily advisory in nature. It is the responsibility of the administering agency to determine whether such a committee is primarily operational. If so, it would not fall under the requirements of the Act and this regulation, but would continue to be regulated under relevant laws, subject to the direction of the President and the review of the appropriate legislative committees; or

(j) Any meeting initiated by a Federal official(s) with more than one individual

for the purpose of obtaining the advice of individual attendees and not for the purpose of utilizing the group to obtain consensus advice or recommendations.

§ 101–6.1005 By what authority may an advisory committee be established?

An advisory committee may be established in one of four ways:

(a) By the President by Executive Order;

(b) By law where the Congress specifically directs the President or an agency to establish it;

(c) By law where the Congress authorizes but does not direct the President or an agency to establish it. In this instance, an agency head shall follow the procedures provided in § 101–6.1007; or

(d) By an agency under general agency authority in Title 5 of the United States Code or under other general agency-authorizing law. In this instance, an agency head shall follow the procedures provided § 101–6.1007.

§ 101–6.1007 How does an agency head establish an advisory committee?

(a) In establishing or using an advisory committee, the head of an agency shall comply with the Act and this subpart, and shall—

(1) Prepare a proposed charter for the committee which includes the information listed in section 9(c) of the, Act; and

(2) Submit an original and one copy of a letter to the Administrator proposing to establish or use, reestablish, or renew an advisory committee. The letter shall include the following information:

(i) An explanation of why the committee is essential to the conduct of agency business and in the public interest;

(ii) An explanation of why the committee's functions cannot be performed by the agency, another existing advisory committee, or other means such as a public hearing; and

(iii) A description of the agency's plan to attain balanced membership. For purposes of obtaining balance, agencies shall consider for membership a cross-section of interested persons and groups with demonstrated professional or personal qualifications or experience to contribute to the functions and tasks to be performed. This shall not be construed to limit the participation of any individual where such participation is necessary to obtain divergent points of view that are relevant to the business of the advisory committee. The letter shall be accompanied by two copies of the proposed charter.

(3) The requirements of paragraphs (a)(1) and (a)(2) of this section shall apply for any subcommittee of a chartered advisory committee, whether its members are drawn in whole or in part from the parent advisory committee, which functions independently of the parent advisory committee such as by making recommendations directly to the agency rather than for consideration by the chartered advisory committee.

(b) The Administrator will review the proposal and notify the agency head of concurrence or nonconcurrence within 15 days of receipt, if possible.

(c) Upon receipt of the Administrator's notification, the agency head shall notify the Administrator in writing that either:

(1) The advisory committee is being established. The filing of the advisory committee charter as specified in § 101–6.1013 shall be considered appropriate written notification in this instance. The agency head shall then comply with the provisions of § 101–6.1009 for an established advisory committee; or

(2) The advisory committee is not being established. In this instance, the agency head shall also advise the Administrator if the agency head intends to take any further action with respect to the proposed advisory committee.

§ 101–6.1009 What responsibilities does an agency head have for an established advisory committee or subcommittee as specified in § 101–6.1007?

(a) The agency head shall:

(1) File the charter as specified in § 101–6.1013;

(2) Issue agency regulations or guidelines as may be necessary to operate and oversee the advisory committee;

(3) File required documents;

(4) Publish required notices in the Federal Register;

(5) Designate a Committee Management Officer for the agency;

(6) Appoint a Designated Federal Official for each advisory committee;

(7) Ensure the opportunity for public participation as required;

(8) Ensure that detailed minutes are kept of each advisory committee meeting;

(9) Ensure that certain rates of pay are justified;

(10) Submit required reports; and

(11) Terminate the advisory committee when appropriate.

(b) The agency head should:

(1) Not later than the initial meeting of an advisory committee, submit to committee members, committee staff, consultants, and appropriate agency management personnel a written statement of the purpose, objectives and expected accomplishments for the committee.

(2) Solicit in writing or in a formal meeting at least annually the views of the committee members on the effectiveness, activities, and management of the committee, including recommendations for improvement. Comments received should be reviewed by the agency head or senior policy official responsible for the committee to determine whether improvements or corrective action is warranted. Copies of such recommendations should be retained until the committee is terminated or renewed.

(3) Involve key management personnel of the agency whose interests are affected by the committee in committee meetings, including reviewing reports and establishing agendas.

(4) Limit membership on advisory committees to 25 members for committees with an agency-wide mission and 12 members for committees with a more narrowly defined function or specialized area of interest. An agency head may authorize additional members for a committee when the agency head determines that such additional members are necessary to the function of the committee or to achieve balanced membership.

(5) Periodically but not less than annually review the level of agency staff support dedicated to advisory committees to ensure that expenditures are justified in consideration of committee activity and the benefits accruing to the Government.

(6) Monitor the attendance and participation of advisory committee members and consider replacing any member who has missed a substantial number of scheduled committee meetings.

(7) Establish meeting dates and distribute agendas and other meeting materials well in advance.

§ 101–6.1011 What are the responsibilities of the chairperson of an independent Presidential advisory committee?

The Chairperson shall comply with the Act and this regulation and shall—

(a) Determine with the Administrator or his or her delegate the role of the designated Federal Official;

(b) Designate a Committee Management Officer for the committee; and

(c) Fulfill the responsibilities of an agency head as specified in paragraphs (a)(1), (3), (4), (7), (8), and (10) of § 101–6.1009.

§ 101–6.1013 What are the charter filing requirements?

No advisory committee may operate, meet, or take any action until its charter has been filed as follows:

(a) *Advisory committee established, used, reestablished, or renewed by an agency.* The agency head shall file—

(1) The charter with the standing committees of the Senate and of the House of Representatives having legislative jurisdiction of the agency;

(2) A copy with the Secretariat; and

(3) A copy with the Library of Congress, Exchange and Gift Division, Federal Documents Section, Federal Advisory Committee Desk, Washington, DC 20540.

(b) *Advisory committee specifically directed by law or authorized by law.* Procedures are the same as in paragraph (a) of this section.

(c) *Presidential advisory committee.* When either the President or the Congress establishes an advisory committee which advises the President, the responsible agency head or, in the case of an independent Presidential advisory committee, the President's designee, shall file—

(1) The charter with the Secretariat;

(2) A copy with the Library of Congress; and

(3) If specifically directed by law, a copy with the standing committees of the Senate and of the House of Representatives having legislative jurisdiction of the agency or of the independent Presidential advisory committee.

§ 101–6.1015 What advisory committee information must be published in the Federal Register?

(a) *Committee establishment, reestablishment, or renewal.*—(1) A notice in the Federal Register is required when any advisory committee, except a committee directed by law or established by the President, is established, reestablished, or renewed. Upon receiving notification of the completed review and concurrence in the committee from the Administrator, the agency head shall publish a notice in the Federal Register that the committee is being established, reestablished, or renewed, and for a new committee such notice shall also include a statement describing the nature and purpose of the committee and an affirmation that it is necessary and in the public interest.

(2) Establishment and reestablishment notices shall appear at least 15 days before the committee charter is filed, except that the Administrator may approve less than 15 days when requested for good cause by the agency head. The 15-day notice requirement does not apply to committee renewals.

(b) *Committee meetings.*—(1) The agency head or the chairperson of an independent Presidential advisory committee shall publish at least 15 days prior to an advisory committee meeting a notice in the Federal Register which includes:

(i) The exact name of the advisory committee as chartered;

(ii) The time, date, place, and purpose of the meeting;

(iii) A summary of the agenda; and

(iv) A statement whether all or part of the meeting is open to the public or closed, and if closed, the reasons why, citing the specific exemptions of the Government in the Sunshine Act (5 U.S.C. 552b) as the basis for closure.

(2) In exceptional circumstances, the agency head or chairperson of an independent Presidential advisory committee may give less than 15 days notice, provided that the reasons for doing so are included in the committee meeting notice published in the Federal Register.

§ 101–6.1017 What are the duties of the agency Committee Management Officer?

(a) The Committee Management Officer is designated by the agency head or by the chairperson of an independent Presidential advisory committee and his or her name, agency address, and phone number given to the Secretariat.

(b) The Committee Management Officer shall—

(1) Discharge the responsibilities enumerated in section 8(b) of the Act;

(2) Maintain in a single location a complete set for the charters and membership lists of each of the agency's advisory committees;

(3) Maintain information on the nature, functions, and operations of each of the agency's advisory committees; and

(4) Provide information on how to obtain copies of minutes of meetings and reports of each of the agency's advisory committees.

§ 101–6.1019 What are the duties of the Designated Federal Official?

The agency head, or in the case of an independent Presidential advisory committee, the Administrator, shall designate a full-time Federal employee to be the Designated Federal Official for the advisory committee, who shall—

(a) Attend the meetings;

(b) Adjourn the meetings when he or she determines that adjournment is in the public interest, and

(c) For agency-established advisory committees:

(1) Approve or call the meeting of the advisory committee;

(2) Approve the agenda; and

(3) Chair the meeting when so determined by the agency head.

§ 101–6.1021 How may the public participate in advisory committee meetings?

The agency head, or the chairperson of an independent Presidential advisory committee, shall ensure that—

(a) Each advisory committee meeting is held at a reasonable time and in a place reasonably accessible to the public;

(b) The meeting room size is sufficient to accommodate advisory committee members, committee or agency staff, and interested members of the public;

(c) Any member of the public is permitted to file a written statement with the advisory committee; and

(d) Any member of the public may speak at the advisory committee meeting if the agency's regulations or guidelines so permit.

§101–6.1023 What is the procedure for closing an advisory committee meeting?

(a) To close all or part of a meeting, a duly authorized official acting on behalf of the committee shall submit a request to the agency head, or, in the case of an independent Presidential advisory committee, the Administrator or his delegate, at least 30 days prior to the scheduled meeting date, citing the specific provisions of the Government in the Sunshine Act (5 U.S.C. 552b) which justify the closure. The agency head, or, in the case of an independent Presidential advisory committee, the Administrator, may waive the 30-day requirement when a lesser period of time is requested and justified by the duly authorized official or chairperson.

(b) As required by the Government in the Sunshine Act, the general counsel of the agency, or in the case of an independent Presidential advisory committee, the General Services Administration Counsel, shall review all requests to close meetings.

(c) If the agency head, or in the case of an independent Presidential advisory committee, the Administrator or the person to whom such authority is delegated by the agency head or Administrator, determines that the request is consistent with the Government in the Sunshine Act and the Federal Advisory Committee Act, he or she shall issue a determination that all or part of the meeting may be closed.

(d) The agency head, or the chairperson of an independent Presidential advisory committee, shall:

(1) Make a copy of the determination available to the public upon request; and

(2) Publish the meeting notice in the Federal Register, including the reasons why all or part of the meeting is closed, citing the specified exemptions used from the Government in the Sunshine Act.

§ 101–6.1025 Are minutes required at advisory committee meetings?

The agency head or, in the case of an independent Presidential advisory committee, the chairperson, shall ensure that detailed minutes of each advisory committee are kept. The minutes must include—

(a) Time, date, and place;

(b) A list of the following persons who were present:

(1) Advisory committee members and staff;

(2) Agency employees; and

(3) Members of the public who present oral or written statements;

(c) An estimated number of other members of the public present;

(d) An accurate description of each matter discussed and the resolution, if any, made by the committee of such matter; and

(e) Copies of each report or other document received or issued by the Committee.

§ 101–6.1027 How are advisory committees terminated?

Any advisory committee shall automatically terminate not later than 2 years after it is established, reestablished, or renewed, unless—

(a) Its duration is otherwise provided in law;

(b) It is renewed; or

(c) The President or agency head terminates it before that time.

§ 101–6.1029 How are advisory committees renewed?

(a) Advisory committees established by the President may be renewed by appropriate action of the President and the filing of a new charter.

(b) Advisory committees specifically directed by law:

(1) Which terminate under the provisions of section 14 of the Act may be reestablished by an agency head, provided that the agency head complies with the provisions of § 101–6.1007; or

(2) Whose duration extends beyond 2 years shall require a new charter to be filed every 2 years after the date of enactment of the law establishing the committee. If a new charter is not filed, the committee is not terminated, but may not meet or take any action.

(c) Advisory committees authorized by law or established or used by an agency: At least 30 but not more than 60 days before the committee terminates, an agency head who intends to renew a committee shall comply with the provisions of § 101–6.1007.

§ 101–6.1031 When should an advisory committee charter be amended?

(a) *Committees established by the President or specifically directed by law.* When the President by Executive order or the Congress by law changes the authorizing language which has been the basis for establishing an advisory committee, the agency head or chairperson of an independent Presidential advisory committee shall—

(1) Amend those sections of the current charter affected by the new Executive order or law; and

(2) File the amended charter as specified in § 101–6.1013.

(b) *Agency-authorized committees.* The charter of an agency-authorized advisory committee may be amended when an agency head determines that the existing charter no longer accurately reflects the goals or procedures of the committee. Changes may be minor, such as revising the name of the advisory committee, or may be major dealing with the basic objectives or composition of the committee.

(1) To make a minor amendment to a committee charter, an agency head shall:

(i) Amend the charter language as necessary, and

(ii) File the amended charter as specified in § 101–6.1013.

(2) To make a major amendment to a committee charter, an agency head shall:

(i) Amend the charter language as necessary,

(ii) Submit the proposed amended charter with a letter to the Administrator requesting concurrence in the amended language and an explanation of why the changes are essential and in the public interest. The Administrator or his or her delegate will give notice to the agency head of concurrence or nonconcurrence in the request within 15 days of receipt of the request, if possible; and

(iii) File the amended charter as specified in § 101–6.1013.

(c) *Renewals.* Amending any existing advisory committee charter does not constitute renewal of the committee under § 101–6.1029.

§ 101–6.1033 When should advisory committee members and staff receive compensation and expense reimbursements for committee activities?

(a) *Committee members.* Unless specifically required by law, agencies shall not compensate advisory committee members for their service on an advisory committee. In the exceptional case where an agency head is unable to meet the need for technical expertise or the requirement for balanced membership solely through the appointment of noncompensated members, the agency head may contract for the services of a specific consultant who may be appointed as a member of the advisory committee. In such a case, the agency head shall follow the procedures set forth in paragraph (b) of this section. This paragraph (a) shall apply to any committee member appointed after May 15, 1983. No committee member shall be compensated other than as allowed in paragraph (b) of this section after September 30, 1983.

(b) *Consultants.* Prior to hiring a consultant to an advisory committee, the agency head must determine that the expertise or viewpoint to be offered by the consultant is not otherwise available without cost to the agency. When an agency head hires a consultant, the compensation may not exceed the maximum rate of pay authorized by 5 U.S.C. 3109. Hiring of consultants shall be in accordance with OMB Circular A–120 and applicable statutes, regulations, and Executive Orders.

(c) *Staff members.* An agency may fix the pay of each advisory committee staff member at a rate of the General Schedule, General Management Schedule, or Senior Executive Service in which the Staff member's position would appropriately be placed (5 U.S.C. Chapter 51). An agency may not fix the pay of a staff member at a rate higher than the daily equivalent of the maximum rate for GS–15, unless the agency head has determined that under the General Schedule, General Management Schedule, or Senior Executive Service classification system, the staff member's position would appropriately be placed at a grade higher than GS–15. This determination must be reviewed annually by the agency head.

(1) In establishing rates of compensation, the agency head shall comply with applicable statutes, regulations, and Executive Orders.

(2) A staff member who is a Federal employee shall serve with the knowledge of the Designated Federal Official and the approval of the employee's direct supervisor. If a non-Federal employee, the staff member shall be appointed in accordance with applicable agency procedures, following consultation with the advisory committee.

(d) *Travel expenses.* Advisory committee members and staff members, while engaged in the performance of their duties away from their homes or regular places of business, may be allowed travel expenses, including per diem in lieu of subsistence, as authorized by section 5703 of title 5, United States Code, for persons employed intermittently in the Government service.

(e) *Special services.* While performing advisory committee duties, an advisory committee member who is blind or deaf or who qualifies as a handicapped individual may be provided services by a personal assistant for handicapped employees if the member—

Qualifies as a handicapped
/idual as defined by section 501 of
Rehabilitation Act of 1973 (29 U.S.C.
; and

.2) Does not otherwise qualify for
.sistance under 5 U.S.C. 3102 by reason
.f being an employee of an agency.

(f) *Noncompensated services.* Nothing in this section prevents an agency from accepting the noncompensated or reimbursed services of a member, consultant, or staff member of an advisory committee.

(g) *Exclusions.*—(1) Nothing in this section prevents any person who (without regard to his or her service with an advisory committee) is a full-time Federal employee from receiving compensation at the rate at which he or she otherwise would be compensated as a full-time Federal employee.

(2) Nothing in this section prevents any person who immediately before his or her service with an advisory committee was a full-time Federal employee from receiving compensation at the rate at which he or she was compensated as a full-time Federal employee.

(3) Nothing in this section affects a rate of pay or a limitation on a rate of pay that is specifically established by law or a rate of pay established under the General Schedule classification and pay system in chapter 51 and chapter 53 of title 5, United States Code.

§ 101–6.1035 What reports are required for advisory committees?

GSA will periodically issue instructions to agencies regarding reporting requirements and procedures. Included in those requirements, each agency shall file a report on a fiscal year basis providing requested program, financial, and membership information to GSA. This information shall be used by GSA for preparing program recommendations and status reports on advisory committee matters, and for assisting the President in preparing and submitting a fiscal year report to the Congress. The membership list for each advisory committee shall be updated quarterly with notification furnished to GSA of all new vacancies and appointments during the period.

[FR Doc. 83-11387 Filed 4-27-83; 8:45 am]
BILLING CODE 6820-26-M

ATTACHMENT B

Federal Bar Association

July 26, 1983

The Honorable Gerald P. Carmen
Administrator
General Services Administration
Washington, D.C. 20405

Dear Mr. Carmen:

By this letter the Federal Bar Association is providing you with a copy of the comments of its Select Committee on FACA on GSA's FMPR published in the Federal Register on April 28, 1983 (48 Fed. Reg. 19324) which were timely filed today. As President of the FBA, I asked a number of individuals, all of whom had a significant familiarity with the issues surrounding FACA to lend their expertise to the Association in devising its approach to FACA.

Among the conclusions of the Select Committee in assisting the Association was the apparent need to comment on GSA's interim rule. The implementation of FACA and GSA's role in that implementation are certainly too important to be ignored. While the attached comments do not necessarily reflect the views of each member of the Committee, and while the members may individually file comments which vary from the attached, the FBA's comments reflect some basic consensus that was achieved by the Select Committee after much debate. While these views may not provide final answers to many of the questions raised in the interim regulations, they certainly help focus the debate on these difficult issues. We submit them in this spirit.

I would like to note that Ron Martinson, Special Assistant to the Archivist, Committee Management Secretariat, was particularly generous in sharing his time and technical expertise to the Select Committee in its deliberations. He offered no policy direction to the Select Committee, however.

We at the FBA are pleased to be able to provide you with this submission and we are prepared to work with you in your further efforts to refine the management and creation of Federal advisory committees.

Sincerely yours,

Paul G. Dembling
President

cc: Filed with our official comments.

Federal Bar Association

July 26, 1983

Special Assistant to the Archivist (NX)
National Archives and Records Service
Washington, D.C. 20408
Attn: FPMR Comments

Dear Sir:

Because of the importance of the issues affecting citizen participation in Government, Paul Dembling, President of the Federal Bar Association, convened a Select Committee on the Federal Advisory Committee Act composed of individuals who have had considerable experience with the Act. The members of the Select Committee have carefully considered the interim regulations published by GSA in the Federal Register on April 28, 1983 (48 Fed. Reg. 19324). It is clear that GSA has directed very careful attention to this draft of the regulations and GSA and the Committee Management Secretariat deserve much praise for their efforts.

Advisory committees play a most important role in the Federal governing process, including expanding agency officials' horizons, exposing agencies to new knowledge, increasing the range of potential agency responses, and enabling agencies to learn about relevant developments outside their own organizations.

The Eleventh Annual Report of the President on Federal Advisory Committees covering the calendar year 1982 noted that, as of year-end 1982, there were 878 Federal advisory committees. As the President's transmittal message to Congress notes, "In 1982, advisory committees afforded a unique opportunity for over 19,000 private citizens of all backgrounds to provide valued and needed counsel to Federal officials in establishing policies and improving operations of the government."

Recent examples of the highly important work performed by Federal advisory committees have included the recommendations of the advisory committees on social security reform, the MX missile, U.S. policy on Central America, and cost savings from private sector initiatives throughout the Federal Government. The range of inquiry undertaken by such committees has involved a very large amount of money, undoubtedly many billions of dollars.

With such important issues under study by Federal advisory committees, the importance of crafting fair and effective regulations to implement the Federal Advisory Committee Act is evident. The transcending purpose of such regulations should be the protection of the integrity, objectivity and fairness of balanced citizen participation in the Federal governmental process. The public should be given an opportunity to view and participate in the development of government policy through a fair and open process rather than through a decision-making process of preferential, insulated access of special interest groups.

A majority of the Select Committee suggests the following changes to the regulations as published:

1. Exemption of Operational Committees (Section 101-6.1004(i), p. 19327).

In view of the language of FACA, which provides in Section 9(b) that advisory committees shall be utilized "solely for advisory functions," and because of differing opinions and varied agency practice concerning the distinction between advisory and operational committees, we recommend that further study be given to this Section.

2. Exemption of Meetings (Section 101-6.1004(j), p. 19327-28).

In lieu of present paragraph (j), we recommend the following:

"(j) Any group of two or more persons which does not have an organization, structure and relationship to a decision-making official typical of an advisory committee, and which does not meet more than one time."

In determining whether a group of citizens has an "organization, structure and relationship to a decision-making official typical of an advisory committee," so that a single meeting should be subject to FACA, the following factors should be considered.*

* Whether a specific action or policy decision is under consideration;

* Whether the group will be asked for recommendations on the specific action or policy;

* Whether the agency circulates materials or documents for review prior to the meeting;

* Whether the citizens attending the meeting have a direct stake in the pending agency action or policy;

* Whether the group plans to meet again with the federal official or department;

* Whether there are clearly defined interests with differing points of view about the subject matter under discussion;

* Whether the meeting is with a federal official of sufficient authority to take action on any advice or recommendations that may be offered; and

* Whether the group of citizens has a fixed membership and formal organizational structure.

No one of these factors should be dispositive. If enough of these factors are present, the single meeting should be subject to FACA. If very few are present, there should be no formal obligation for the meeting to be open, or for the group to be chartered.

If several factors are present, and there is genuine doubt about the application of FACA to the meeting, the agency might follow an approach which would satisfy the spirit of FACA, but not necessarily all of its literal requirements. It might proceed with the meeting, as planned, and provide notice (in the Federal

* See R. Wegman, Report on the Utilization and Management of Federal Advisory Committees, (June 1983), 165-66, Charles F. Kettering Foundation.

Register) of the meeting and the issues discussed. The agency could then provide an equivalent opportunity (or opportunities) for other interested groups or individuals to meet with the agency to present their views on the issue under consideration. For such an "equivalency" approach to be meaningful, the subsequent meetings should be timely, and they should take place with the same federal official, or with another official of the same rank and status.

3. Subcommittees: whether subject to FACA or not (Section 101-6.1007(a)(3), p. 19328).

A) Section 1007(a)(3) should be re-designated 1007(b); and 1007(b) as (c); and 1007(c) as (d).

B) The provision governing subcommittees should be tightened by substituting the following language:

"(b) The requirements of paragraphs (a)(1) and (a)(2) of this section shall apply to any subcommittee of a chartered advisory committee which provides advice and recommendations and which meets one or more of the following criteria:

(1) Has members other than members of the parent committee; or

(2) Has functions other than, or different from, the parent committee; or

(3) Functions independently of the parent committee, for example, by making recommendations directly to the agency head rather than through the parent comittee.

Subcommittees composed of members of the parent committee, which provide advice and recommendations through the parent committee shall be exempt from the chartering and consulation provisions in (a)(1) and (a)(2), but are subject to the other provisions of the Act."

If Section 101-6.1007(b) (as redesignated) is not revised, many subcommittees which are not composed of any members of the parent committee and do not make recommendations to Federal officials but to the parent committee will be exempt from FACA. We do not believe such a loophole was intended by the drafters of the Act and we believe the above revision is necessary to proper interpretation and clear understanding.

4. Consultation Process (Section 101-6.1007(b), p. 19328).

We recommend that Section 1007(b) (redesignated as 1007(c)) be changed to the following:

"The Administrator will review the proposal and notify the agency head of concurrence or nonconcurrence within 15 days of receipt. If the Secretariat does not respond with a recommendation within 15 days, the agency may proceed with establishment of a committee."

An agency head should have the authority to proceed as quickly as possible with the establishment of a new committee which the agency head deems essential. The agency head should not be subjected to the delays of the current chartering process. The average consultation period for some agencies with OMB/GSA has in many cases been three to nine months. Streamlining the process will also lessen the temptation for agencies to go underground to circumvent the long delay and

red tape of the sometimes lengthy consultation period.

The GSA Committee Management Secretariat has recognized that this procedure has caused problems and has tried to overcome the difficulty by promising a 15-day turn around, "if possible." We commend GSA for this, but the "if possible" provision could keep agencies waiting for lengthy periods.

OMB Circular A-63, March 27, 1974 also reflected good intentions regarding a quick turn-around in the consultation process for establishing new committees in Section 6, which states:

> "If not satisfied that establishment of the advisory committee would be in accordance with the Act, the OMB Secretariat shall inform the agency head in writing within 15 days of receipt of the agency letter."

The comments which are included in the preamble of the interim regulations are pertinent to avoiding future confusion regarding the meaning of a GSA nonconcurrence. Therefore, we recommend that this part of the preamble be included directly in the body of the rule following the above language in (redesignated) Section 101-6.1007(c):

> "We do not view or interpret the words 'concur/nonconcur' as implying a veto power by GSA over a determination which properly rests in the head of another agency. Rather, we interpret the word 'concur' as meaning that GSA agrees the establishment of a particular committee is in accord with the terms and spirit of FACA. Conversely, a nonconcurrence would indicate GSA's opinion that the establishment of a committee is not in accord with FACA.
>
> GSA also believes that its notification of 'concurrence/nonconcurrence' to an agency head is a logical way to complete the consultation process. Such notification is GSA's means of letting the agency head know that the consultation process has been fulfilled.
>
> In the final analysis, a nonconcurrence by GSA would not legally prevent an agency from establishing a particular committee. However, GSA in discharging its oversight function of advisory committees intends to prepare and submit periodic reports to the President, OMB, and the Congress. Our nonconcurrence in any advisory committee, therefore, would be included in these reports."

5. Size of Advisory Committees (Section 101-6.1009(b)(4), p. 19328)

We do not think GSA should include the arbitrary principle of limiting advisory committees to 25 members for committees with an agency-wide mission and 12 members for committees with a more narrowly defined function or specialized area of interest. The agency head should have the flexibility to make this decision based on his or her evaluation of the complexity of the subject matter to be dealt with, the highly specialized expertise required, and the time allotted to complete the activity. While committees with more than 25 members may be more difficult to manage, establishing a larger umbrella committee is often an efficiency measure because it saves costs of setting up separate committees and staffs. The larger committees sometimes do their staff work through smaller panels or subcommittees which report to the parent committee.

6. Elimination of Compensation (Section 101-6.1033, p. 19330)

Section 101-6.1033 provides that agencies shall not compensate advisory committee members for their service on an advisory committee. In exceptional cases, an agency head may contract for the services of a specific consultant.

The commitee believes that this section violates the letter and spirit of FACA and should be withdrawn.

Section 7(d)(1) of the Act provides in pertinent part that:

> the "Director of OMB (whose functions were transferred by a duly approved Executive Branch Reorganization Plan to the Administrator, GSA) after study and consultation with the Civil Service Commission (OPM), shall establish guidelines with respect to uniform fair rates of pay for comparable services of members, staffs, and consultants of advisory committees in a manner which gives appropriate recognition to the responsibilities and qualifications required and other relevant factors."

The "no-pay" provision appears neither to be "fair" nor to represent "rates of pay for comparable services."

The no-compensation policy will prove to be a decisive factor within the committee's membership if some members are not paid and others are paid because they "held out" for compensation. Furthermore, the cost-effectiveness of such a provision is questionable in view of the extra staff time and resources that will be spent to try to find experts who are willing to volunteer their services. In addition, this policy tends to skew significantly membership to favor the view of those who are able to participate at their own expense or who are employed by relatively wealthy organizations which are interested in the outcome of the debate. A less well-funded organization may find it difficult to spare staff members for activities not directly related to its purposes. This policy appears to be a giant step backward.

As a means of compensating committee members when needed, the proposal in Section 101-6.1033(a) that "the agency head may contract for the services of a specific consultant who may be appointed as a member of the advisory committee" will prove impracticable, for example, in view of the operation of 5 USC 3109, as referred to in 1033(b).

Circular A-63, issued by OMB in revised form in 1974, expressly authorized compensation in accordance with the standard government classification system. We recommend its inclusion verbatim in the Regulations, as it has been revised from time to time.

CIRCULAR A-63 (REVISED)

11. Uniform pay guidelines.

a. Pay for members of an advisory committee.

(1) Subject ot the provisions of this paragraph, an agency shall fix the pay of the members of an advisory committee to the daily equivalent of a rate of the General Schedule in 5 U.S.C. 5332 unless the members are appointed as consultants and compensated as provided in 11c below.

(2) In determining an appropriate rate of pay for the members of an advisory committee, an agency shall give consideration to the significance, scope, and technical complexity of the matters with which the advisory committee is concerned and the qualifications required of the members of the advisory committee.

(3) An agency may not fix the pay of the members of an advisory committee at a rate higher than the daily equivalent of the maximum rate for GS-15 unless the head of the agency has personally determined that, under the factors set forth in paragraph 11b(2), a higher rate of pay is justified and necessary. Such a determination must be reviewed by the head of the agency annually.

b. Pay for the staff of an advisory committee.

(1) Subject to the provisions of b(2), below, an agency shall fix the pay of each member of the staff of an advisory committee at a rate of the General Schedule in which the staff member's position would approximately be placed were the General Schedule classification system in chapter 51 of title 5, United States Code, applicable to the position.

(2) An agency may not fix the pay of a member of the staff of an advisory committee at a rate higher than the daily equivalent of the maximum rate for GS-15 unless the head of the agency has determined that, under the General Schedule classification system, the staff member's position would appropriately be placed in the General Schedule grade higher than GS-15. Such a determination must be reviewed by the head of the agency annually.

c. Pay for consultants to an advisory committee. An agency shall fix the pay of a consultant to an advisory committee after giving consideration to the qualifications required of the consultant and the significance, scope, and technical complexity of the work. The rate of pay shall not exceed the maximum rate of pay which the agency may pay experts and consultants under 5 U.S.C. 3109.

d. Voluntary services of an advisory committee member. The provisions of this section shall not prevent an agency from accepting the voluntary services of a member of an advisory committee, or a member of the staff of an advisory committee, provided that the agency has authority to accept such services without compensation.

e. Reimbursable travel expenses for advisory committee members and staff. The members of an advisory committee, and the staff thereof, while engaged in the performance of their duties away from their homes or regular places of business, may be allowed travel expenses, including per diem in lieu of subsistance, as authorized by 5 U.S.C. 5703 for persons employed intermittently in the Government service.

We would be pleased to discuss these comments further.

Sincerely,

J. Clay Smith, Jr.

Dr. J. Clay Smith, Jr.
Chair, Federal Bar Association
Select Committee on the Federal Advisory Committee Act

MEMORANDUM CONCERNING THE FEDERAL BAR ASSOCIATION
TESTIMONY ON IMPLEMENTATION OF THE FEDERAL ADVISORY
COMMITTEE ACT

Please note the attached "Additional Concurring Comments of Alex Naimon," dated July 25, 1983, which should be incorporated into attachment "B" of the FBA testimony package, as part of the FBA submission.

ADDITIONAL CONCURRING COMMENTS OF ALEX NAIMON

July 25, 1983

Paul Dembling, Esq.
President, FBA
Dear Paul:
Dear Mr. Dembling:

Although I generally concur with the Select Committee on Advisory Committees' proposed letter to GSA, I have the following additional thoughts which I am taking the liberty of communicating to you by way of a separate concurring comment. Though I raised most of these points at meetings of either the drafting subcommittee or the full committee, or both, time has not permitted discussion and consensus to be arrived at concerning these additional ideas:

1. I believe it would be preferable for any FBA letter to GSA commenting on GSA's proposed regulations appearing in the April 28, 1983 Federal Register to be addressed to the GSA Administrator, Mr. Gerald Carmen, rather than to the Special Assistant to the Archivist, GSA, Mr. Ron Martinson, who is a member of our very Select Committee; in addition, it would be preferable if you as President would sign the transmittal to GSA from FBA because the Select Committee is making substantive comments and, at least by implication, is recomending significant changes in the GSA's April 28 proposals.

2. Any FBA comment on the April 28 GSA proposed regulations should recommend that final publication of these regulations be delayed at least until OMB and the Department of Justice have submitted formal comments on the substance and the legal sufficiency of the proposed regulations, inasmuch as the

Federal Advisory Committee Act (FACA) was originally implemented by the issuance of OMB Circular A-63 by OMB and the Department of Justice jointly. Notwithstanding the reorganization of FACA functions by President Carter in 1977 transferring most OMB functions under FACA to GSA (as to which neither the Senate nor the House exercised a legislative veto), OMB continued to exercise management control over FACA issues, in the process accumulating ten years of experience. Under these circumstances it makes little sense for GSA, the purported successor, to make significant changes in the implementation of FACA without the benefit of OMB's public comments and a discussion of GSA's reaction to such comments in the Federal Register, which would enable the interested public to understand the nature of GSA's proposals.

3. It is a long-established principle of good management that authority and responsibility should go together. Several members of the Select Committee understand, nevertheless, that GSA's intention in administering its proposed regulations is to continue to be guided by OMB, so that OMB would have the authority and GSA the responsibility. Added to this intention is the fact that GSA proposals purport to authorize GSA not only to be consulted by agency heads seeking to establish advisory committees as called for in section 9(b) of FACA, but also, beyond statutory authority, to concur, non-concur, or "pocket veto" such agency proposals by withholding such concurrence/non-concurrence. Under these circumstances the Governmental Affairs Committees of Congress should review such apparent "usurpation"

of legislative functions by GSA, particularly if GSA may be merely a figurehead agency in this context. Accordingly, the FBA should bring this issue (and others raised by GSA proposals) to the attention of the appropriate committees of the Congress promptly, in any event before the GSA April 28 proposals are published in final form.

4. In issuing Executive Order 12291 shortly after taking office, President Reagan released a statement assuring the public that significant regulations would not be issued until his high-level committee on Regulatory Reform, chaired by the Vice-President, had reviewed such proposed regulations in detail. GSA's April 28 proposals certainly meet any reasonable definition of a significant regulation, having been issued three times in different forms already; these proposals form the basic ground rules under which the country's least tractable issues, involving trillions of dollars (e.g., social security, Scowcroft (missiles-disarmament), Central America (war-peace), civil disorders (Kerner), Agent Orange), are increasingly being dealt with by advisory committees. Already many are criticizing the President and Congress for encouraging the government to be run by advisory committees. FACA is designed minimally to ensure public participation and balanced membership in the making of government policy when the Executive Branch turns to non-Governmental entities to assist in formulating such policies, and so is a vital cog in assuring the perpetuation of democratic values. Although the specific language of E.O. 12291 can be read narrowly so as to

exclude a review of the GSA April 28 proposals by characterizing them as non-major, it would be a far better interpretation of the President's intention in issuing E.O. 12291 as applying to the April 28 proposals of GSA. This view should be communicated by FBA to both GSA and the Committee on Regulatory Reform.

5. Various agencies and Departments have commented that since there were many significant changes between GSA's previous publication of its proposed FACA implementation and its later April 28, 1983 issuance, the latter should have been published as a proposed regulation rather than as an interim regulation. While at first blush this distinction might appear to be a mere technicality, close scrutiny of the transaction yields a different conclusion. Publication of the April 28 proposals may subject such proposals to close and formal OMB review under OMB's Paperwork Act implementation issued March 31, 1983, whereas GSA's narrow construction of the latter document has led GSA to consider the OMB March 31, 1983 issuance inapplicable to interim regulations. Accordingly, the FBA should seek to arrange for the Office of Legal Counsel, Department of Justice, to render an opinion as to whether GSA had authority to issue its April 28 proposals in the form of interim regulations purporting to be effective immediately.

6. There are also a series of what appear to be technical errors included in the April 28 GSA proposals which should be brought to GSA's attention in writing. Thus, the definition of "Presidential advisory committee" in Sec. 101-6.1003 is defined

only in the past tense; the terms "Independent Presidential advisory committee" and "Presidential advisory committee" are not sufficiently distinguished from each other; the duties of a Chairperson of an Independent Presidential advisory committee are defined, while the duties of a Chairperson of a Presidential advisory committee are not (likely an unintended distinction); the word "utilized," a crucial word in the statutory definition of "advisory committee," is unsatisfactorily defined by any standard; references to the Government in the Sunshine Act in Sec. 101-6.1023 are not quite correct; and the proposals do not appear to carry forward FACA's requirement for a public report to be made at least annually about an agency's closed meetings. While these may or may not be major defects in the April 28 proposals, FBA should communicate its views on these apparent deficiencies to GSA as soon as possible.

Thank you for the opportunity to serve you and the FBA on this Select Committee.

Cordially,

Alex Naimon

ALEX NAIMON, Member
FBA Select Committee on
Advisory Committees

AN/dn

ATTACHMENT C

APR 19 1984

Honorable Ray Kline
Acting Administrator
General Services Administration
Washington, D. C. 20405

Dear Mr. Kline:

On December 23, 1983, the General Services Administration, National Archives and Records Service, submitted for review under Executive Order No. 12291 a draft final rule on Federal Advisory Committee Management. For the reasons discussed below, we have concluded that this rule would be inconsistent with the policies of the Order, and are returning it for reconsideration and revision.

The principal issue in our review was the language in the regulation that would prohibit all federal agencies from compensating members of advisory committees, except "in the exceptional case where an agency is unable to meet the need for technical expertise or the requirement for balanced membership solely through the appointment of noncompensated members." While we are in full accord with the policy that agencies should use voluntary advisors to the extent practicable, we do not consider this an appropriate matter for government-wide regulation. The needs of the agencies vary considerably, and we see no reason to limit their discretion in what is essentially a management matter.

Advisory committees can be extremely useful in bringing outside views to bear on federal policymaking and management. Those whose knowledge and experience are valuable to Administration policymakers will sometimes be willing and able to serve without compensation, but other times will not be. A policy that generally precludes compensation will in some circumstances significantly hinder the ability of agencies to obtain the views of those who are not part of the government establishment.

Several agencies have made compelling arguments that the rule would seriously interfere with their operations. The objections they have raised are, in our view, substantial and persuasive. At the same time, we have found no evidence of widespread abuses of compensation for federal advisory committee members. To the extent that such abuses exist, we believe they can and should be handled more directly--through the budget process and the actions of policy officials on an agency-by-agency basis--without generally restricting compensation that may be necessary to achieve important Administration objectives.

As a result of our discussions with the affected agencies, we are convinced that they are fully committed to relying on voluntary support wherever practicable. At the same time, they recognize that there are circumstances where compensation for services rendered is simple good management. A regulation limiting their discretion in this regard therefore seems unnecessary and inappropriate.

Sincerely,

/s/ Christopher DeMuth

Christopher DeMuth
Administrator for Information
and Regulatory Affairs

EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF MANAGEMENT AND BUDGET
WASHINGTON, D.C. 20503

March 27, 1974

CIRCULAR NO. A-63
Revised

TO THE HEADS OF EXECUTIVE DEPARTMENTS AND ESTABLISHMENTS

SUBJECT: Advisory Committee Management

1. Purpose. This Circular provides guidance for implementation of the Federal Advisory Committee Act, Public Law No. 92-463, 5 U.S.C. App. I, (hereinafter referred to as the "Act") and Executive Order No. 11769, entitled "Advisory Committee Management."

2. Rescission. This Circular rescinds and supersedes the December 26, 1972 revision of Circular No. A-63 and the OMB/Department of Justice Memorandum on implementation of the Federal Advisory Committee Act (see 38 Fed. Reg. 2306 (1973)).

3. Policy. In the application of this Circular, these principles should be followed.

a. Advisory Committee meetings should be open to the public. Exceptions should be held to the minimum, carefully grounded in law and explained in detail. The emphasis should be on the free flow of information to the public.

b. Advisory committees should be limited to those that are essential. Any advisory committees which are not fulfilling their purposes should be terminated.

c. The recommendations of advisory committees should be considered by those who sought advice, while responsible Federal officers retain authority for decisions.

d. Standards and uniform procedures for the creation, operation, and duration of advisory committees should be established.

4. Definitions. For purposes of this Circular --

a. "Act" means the Federal Advisory Committee Act.

b. "Advisory Committee" has the meaning set forth in Section 3 of the Act.

5. Responsibilities.

a. The Office of Management and Budget (OMB). In general, the functions of the Director under the Act and under Executive Order 11769 shall be carried out by the Committee Management Secretariat of OMB.

b. Departments and agencies.

(1) The head of each agency which uses an advisory committee shall insure compliance with the Act and this Circular and shall issue regulations which apply to all advisory committees established or used by the agency.

(2) The head of each agency which uses an advisory committee shall designate an Advisory Committee Management Officer who shall carry out the functions specified in Section 8(b) of the Act and this Circular. The name of each Advisory Committee Management Officer shall be provided to the OMB Secretariat.

(3) Each agency shall maintain information on the nature, functions, and operations of each of its advisory committees. This shall include a complete set of the charters of the agency's advisory committees, and copies of the annual reports on its advisory committees in a single location.

6. Creation of advisory committees.

a. When an agency proposes to establish an advisory committee not specifically authorized by statute or by the President, the agency head must consult with the OMB Secretariat. Such "consultation" may be in the form of a letter from the agency head describing the nature and purpose of the proposed advisory committee, including an explanation of why the functions of the proposed committee could not be performed by the agency or by an existing committee. The letter, in addition, should describe the agency's plan to attain balanced membership on the proposed committee. If the OMB Secretariat is satisfied that establishment of the advisory committee would be in accord with the Act, the agency head shall certify in writing that creation of the advisory committee is in the public interest. This

certification and a description of the nature and purpose of the committee shall be published in the Federal Register at least 15 days prior to the filing of the committee's charter. The OMB Secretariat may, for good cause, authorize a shorter period of time between publication of the notice and the filing of the charter.

If not satisfied that establishment of the advisory committee would be in accordance with the Act, the OMB Secretariat shall inform the agency head in writing within 15 days of receipt of the agency letter.

b. Unless specifically provided otherwise by statute or Presidential directive, advisory committees shall be utilized solely for advisory functions.

c. (1) Each advisory committee shall file a charter complying with Section 9(c) of the Act. This requirement applies to committees "utilized" as advisory committees, though not established for that purpose.

(2) A copy of each charter shall be furnished to the Library of Congress at the time of filing. Copies should be sent to:

Library of Congress
Exchange and Gift Division
Federal Advisory Committee Desk
Washington, D.C. 20540

7. Termination and renewal of advisory committees.

a. Each nonstatutory advisory committee (i.e., not established by statute or reorganization plan) which is in existence on January 5, 1973, shall terminate no later than January 5, 1975, unless it is renewed by the President or the agency head prior to January 5, 1975.

Before such a committee can be renewed by an agency, the agency head must determine that renewal is necessary and shall inform the OMB Secretariat of his determination and the reasons for it not more than 60 days before the committee expires. If the Secretariat concurs, the agency head shall publish notice of the renewal in the Federal Register and shall file a new charter.

Any advisory committee which is renewed shall continue for not more than two years unless, prior to the expiration of that period, it is renewed. Each such advisory committee established by the President or a Federal officer after January 5, 1973, shall terminate not later than two years after its establishment unless prior to that time it is renewed.

b. Each advisory committee established by statute or reorganization plan which is in existence on January 5, 1973, shall terminate by January 5, 1975, unless its duration is otherwise provided for by law.

(1) Each such advisory committee which is established after January 5, 1973, shall terminate not later than two years after its establishment unless its duration is otherwise provided for by law.

(2) Any such statutory advisory committee shall file a new charter upon the expiration of each successive two-year period following the date of enactment of the statute establishing the committee.

c. No advisory committee required by Section 14(b) of the Act to file a new charter shall take any action, other than preparation and filing of such charter, between the date the new charter is required, and the date it is filed.

8. Operation of advisory committees.

a. Calling of meetings.

(1) No advisory committee shall hold any meeting except at the call of or with the advance approval of the Federal official designated in accordance with Sec. 10(e) of the Act and this Circular. (See 8f below.)

(2) Except with respect to Presidential advisory committees, each meeting of an advisory committee shall be conducted in accordance with an agenda approved by the Federal official. The agenda shall list the matters to be considered at the meeting. It shall also indicate when any part of the meeting will concern matters within the exemptions of the Freedom of Information Act, 5 U.S.C. 552(b).

b. Notice of meetings.

(1) Except when the Director determines otherwise for reasons of national security, timely notice of each advisory committee meeting, whether open or closed to the public, shall be published in the Federal Register. In addition to the notice in the Federal Register, other forms of notice should be used, for example, press releases and notices by mail. Where practicable, agencies should maintain lists of people and organizations interested in particular advisory committees and notify them of meetings by mail.

(2) Such notice should state the name of the advisory committee, the time, place and purpose of the meeting (including where appropriate, a summary of the agenda). Notices ordinarily should state that meetings are open to the public, or, explain why any part is closed.

(3) Such notice should be published at least 15 days before the date of the meeting except that shorter notice may be provided in emergency situations, and the reasons for such emergency exceptions shall be made part of the meeting notice. Agencies should keep in mind the time the Federal Register needs to get notices into print, and plan accordingly.

(4) Notice is not required when the Director has determined that it should not be published for reasons of national security. Any agency advisory committee which seeks such a determination, shall submit its request and a statement of reasons to the Director at least 30 days before the meeting is scheduled.

c. Public participation. The agency head or, in the case of a Presidential advisory committee, the chairman of the committee shall, for any advisory committee meeting, all or part of which is open to the public, assure compliance with the following rules:

(1) Meetings shall be held at a reasonable time and at a place that is reasonably accessible to the public.

(2) The size of the meeting room shall be determined by such factors as the size of the committee, the number of members of the public who could reasonably be expected to attend, the number of persons who attended similar meetings in the past and the resources and facilities available.

(3) Any member of the public shall be permitted to file a written statement with the committee.

(4) Interested persons may be permitted by the committee chairman to speak at the meeting in accordance with procedures established by the committee.

d. Closed meetings.

(1) Section 10(d) of the Act states that the provisions concerning open meetings and public participation "shall not apply to any advisory committee meeting which the President, or the head of the agency to which the advisory committee reports, determines is concerned with matters listed in . . ." 5 U.S.C. 552(b), the exemptions of the Freedom of Information Act.

(2) An advisory committee which seeks to have all or part of a meeting closed on the basis of 5 U.S.C. 552(b) shall notify the agency head or, in the case of a Presidential advisory committee, the Director at least 30 days before the scheduled date of the meeting. The notification shall be in writing and shall specify all the reasons why any part of the meeting should be closed.

If the agency head or the Director finds the request to be warranted and in accordance with the policy of the Act, the request shall be granted. The determination of the agency head or the Director shall be in writing and shall state the specific reasons for closing all or part of the meeting. The determination itself shall be made available to the public on request. The agency head or the Director may delegate responsibility for making the above determinations. However, in any case where a determination to close a meeting is made by a delegate of the agency head, the determination should be reviewed by the agency General Counsel.

(3) When a meeting is closed, the advisory committee shall issue a report at least annually setting forth a summary of its activities and related matters which are informative to the public consistent with the policy of 5 U.S.C. 552(b). Notice of availability of such annual report shall be published in the Federal Register no later than 60 days after its completion. The notice shall include instructions which will allow the public access to the report.

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e. Minutes. Detailed minutes shall be kept of each advisory committee meeting. The minutes shall include: the time and place of the meeting; a list of advisory committee members and staff and agency employees present at the meeting; a complete summary of matters discussed and conclusions reached; copies of all reports received, issued, or approved by the advisory committee; a description of the extent to which the meeting was open to the public; and a description of public participation, including a list of members of the public who presented oral or written statements and an estimate of the number of members of the public who attended the meeting.

The chairman of the advisory committee shall certify to the accuracy of the minutes.

f. Designated Federal employee.

(1) With regard to an advisory committee used by an agency, the agency head shall designate a Federal officer or employee as set forth in Section 10(e) of the Act and determine whether he is to chair or attend the meetings. With regard to Presidential advisory committees such officer or employee may be designated, and his role determined by the Director. Ordinarily, the designated Federal employee should serve on a continuing basis.

(2) No advisory committee shall conduct a meeting in the absence of the designated Federal employee.

(3) The designated Federal employee shall be authorized to adjourn any advisory committee meeting, whenever he determines adjournment to be in the public interest.

9. Reports on advisory committees.

a. The President has delegated, in Executive Order 11769, responsibility for preparation of the annual report required by Section 6(c) of the Act to the Administrator of General Services. The General Services Administration (GSA) will provide appropriate reporting instructions.

b. Two copies of each public report of each Presidential advisory committee shall be submitted to the OMB Committee Management Secretariat at the time of the submission to the President.

10. Comprehensive Review. The annual review required by Section 7(b) of the Act shall be conducted on a calendar-year basis. Agencies may schedule the review so that its results are incorporated in the annual report of advisory committees. The review should examine all advisory committees, and terminate those no longer useful. Advisory committees specifically created by statute or Executive Order should be reviewed, and if appropriate, their termination recommended. The comprehensive review should include, among other things, a summary of the total number of advisory committee meetings, the number of closed or partially closed meetings, and a recapitulation of the exemptions in the Freedom of Information Act used as a basis for closing meetings. The review should also comment in some detail on agency efforts and procedures to insure balanced membership on its advisory committees. The results of the comprehensive review should be included in the annual report to the Administrator of General Services.

11. Uniform pay guidelines.

a. Pay for members of an advisory committee.

(1) Subject to the provisions of this paragraph, an agency shall fix the pay of the members of an advisory committee to the daily equivalent of a rate of the General Schedule in 5 U.S.C. 5332 unless the members are appointed as consultants and compensated as provided in 11c below.

(2) In determining an appropriate rate of pay for the members of an advisory committee, an agency shall give consideration to the significance, scope, and technical complexity of the matters with which the advisory committee is concerned and the qualifications required of the members of the advisory committee.

(3) An agency may not fix the pay of the members of an advisory committee at a rate higher than the daily equivalent of the maximum rate for GS-15 unless the head of the agency has personally determined that, under the factors set forth in paragraph 11b(2), a higher rate of pay is justified and necessary. Such a determination must be reviewed by the head of the agency annually.

b. Pay for the staff of an advisory committee.

(1) Subject to the provisions of b(2), below, an agency shall fix the pay of each member of the staff of an advisory committee at a rate of the General Schedule in which the staff member's position would appropriately be placed were the General Schedule classification system in chapter 51 of title 5, United States Code, applicable to the position.

(2) An agency may not fix the pay of a member of the staff of an advisory committee at a rate higher than the daily equivalent of the maximum rate for GS-15 unless the head of the agency has determined that, under the General Schedule classification system, the staff member's position would appropriately be placed in the General Schedule grade higher than GS-15. Such a determination must be reviewed by the head of the agency annually.

c. Pay for consultants to an advisory committee. An agency shall fix the pay of a consultant to an advisory committee after giving consideration to the qualifications required of the consultant and the significance, scope, and technical complexity of the work. The rate of pay shall not exceed the maximum rate of pay which the agency may pay experts and consultants under 5 U.S.C. 3109.

d. Voluntary services of an advisory committee member. The provisions of this section shall not prevent an agency from accepting the voluntary services of a member of an advisory committee, or a member of the staff of an advisory committee, provided that the agency has authority to accept such services without compensation.

e. Reimbursable travel expenses for advisory committee members and staff. The members of an advisory committee, and the staff thereof, while engaged in the performance of their duties away from their homes or regular places of business, may be allowed travel expenses, including per diem in lieu of subsistence, as authorized by 5 U.S.C. 5703 for persons employed intermittently in the Government service.

12. Effective date. The provisions of this Circular are effective on May 1, 1974.

13. Inquiries. For information concerning this Circular, contact the Office of Management and Budget, Committee Management Secretariat, phone 395-5193 (IDS Code 103).

ROY L. ASH
DIRECTOR

United States of America
Office of
Government Ethics

Office of Personnel Management
Washington, D.C. 20415

July 9, 1982

MEMORANDUM

SUBJECT: Members of Federal Advisory Committees and the Conflict-of-Interest Statutes

FROM: J. Jackson Walter
Director

TO: Heads of Departments and Agencies of the Executive Branch

INTRODUCTION

The purpose of this memorandum is to discuss the applicability of the conflict-of-interest statutes, 18 U.S.C. §§ 202-209, to persons not regularly employed in the Federal Government who accept appointments as members of an advisory committee, board, commission or the like established in a department or agency of the Executive Branch (hereafter "advisory committee" or "committee"). We have been moved to this task both by uncertainties voiced to us concerning this subject and by an occasional flat assertion that advisory committee members, without exception, are outside the coverage of §§ 202-209.

We believe it will be helpful to the departments and agencies and committee members (1) to identify the factors relevant to a determination under existing authority whether or not the persons who are members of a given committee are bound by provisions of the conflict-of-interest laws and (2) by way of illustration, to apply the factors to the memberships of a number of committees now or formerly in existence.

BACKGROUND

Sections 202-209 of Title 18, United States Code, were enacted in 1962 by Public Law 87-849, 76 Stat. 1119, to replace similar laws that had in many ways become outmoded. Those laws in general had been read both in Congress and the Executive Branch to cover persons not otherwise employed by the Government who performed services for it on a temporary or intermittent basis, either singly or as members of

advisory committees.[1] Moreover, they were read to apply to such individuals with the same force and scope as they applied to full-time employees.[2] As a result a highly qualified person who was a partner in, or employed by, an enterprise that had dealings with the Government often could not be recruited by an agency for occasional service because it could not assure him that he or the enterprise would be free of restrictions that were unreasonable in the light of his projected duties.[3]

Although Congress had provided relief for a number of agencies by granting to members of their statutorily created advisory committees limited exemptions from the conflict-of-interest laws,[4] those laws before 1963 by and large remained an appreciable deterrent to the Government's obtaining needed part-time services. One of the main purposes of the new legislation was to facilitate the recruitment of experts for part-time assistance "without relaxing basic ethical standards or permitting actual conflicts of interest."[5] Congress achieved this purpose by creating in 18 U.S.C. § 202(a) the category of "special Government employees" (SGE's), which includes most individuals who serve less than full-time. Section 202(a) in general defines an SGE as an officer or employee of the Government who is appointed or employed to serve it, with or without compensation, for not more than 130 days during any period of 365 consecutive days either full-time or intermittently.[6] SGE's are treated less restrictively in 18 U.S.C. § § 203, 205 and 209 than are regular employees, but not in § § 207 and 208.

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1 There is no substantive difference between an appointee providing advisory service individually and one doing so as a member of a committee. Advisory groups are formed by departments and agencies to carry out collegially the same functions as experts perform working singly. Cf. H. Rept. 2894, 84th Cong., 2d Sess. 5 (1956).

2 See 42 Op. A.G. 111, at 112, 115 (1962). See also United States v. Mississippi Valley Generating Co., 364 U.S. 520, 552 (1961), where the Supreme Court held that an intermittent consultant to the Bureau of the Budget (a precursor of the Office of Management and Budget) who took no oath of office, had no tenure and received no salary was an "officer or agent" of the United States within the compass of 18 U.S.C. § 434, the statute replaced in 1962 by 18 U.S.C. § 208.

3 For example, 18 U.S.C. § 281, the antecedent of the current 18 U.S.C. § 203, was in general construed to prevent a privately employed person who served an agency as an intermittent consultant or adviser, or as a member of an advisory committee, from representing his private employer before any federal agency regardless of the subject matter involved. See 42 Op. A.G. 111 at 121-124.

4 See, for example, 42 U.S.C. § 1314(h), 42 U.S.C. § 2203 and 50 U.S.C. App. § 2160(c).

5 S. Rept. 2213, 87th Cong., 2d Sess. 7 (1962).

6 Procedures and rules for the designation of SGE's by the departments and agencies of the Executive Branch are set forth in the Federal Personnel Manual, Chapter 735, Appendix C, which is entitled "Conflicts of Interest Statutes and Their Effects on Special Government Employees (Including Guidelines for Obtaining and Utilizing the Services of Special Government Employees)" (hereafter referred to as "Appendix C").

As a corollary to the enactment of § 202(a) and the provisions relating to SGE's in the sections that followed it, Congress at the same time enacted a separate provision, § 2 of Public Law 87-849, that foreclosed, as to § § 203-209, the carryover of any of the ad hoc statutory exemptions that were then on the books for the benefit of consultants or advisory committee members in the Executive Branch. Congress thus announced, in effect, that it had established conflict-of-interest measures with regard to those nonregular employees that gave due regard to their proper interests and to those of the Government as well—measures that eliminated the need for ad hoc corrective adjustments in the future.

CHARACTERISTICS OF ADVISORY COMMITTEES AND THEIR MEMBERSHIPS

1. Governing Standards of Appendix C.

The Legislative and Judicial Branches of Government aside, the conflict-of-interest statutes by their terms apply only to an "officer or employee" of the Executive Branch.[7] Almost without exception advisory committee members in that Branch are expected by their host agencies to perform services so infrequently as to require the agencies to place those who are employees in the ranks of the SGE's. For this reason, the authoritative guidelines for an agency's determination whether members of one of its advisory committees are employees for purposes of § § 202-209 appear in Appendix C, which pertains mostly to SGE's.[8]

Appendix C stems from President Kennedy's Memorandum to the Heads of Executive Departments and Agencies, dated February 9, 1962, and entitled "Preventing Conflicts of Interest on the Part of Advisers and Consultants to the Government."[9] The chief purpose of the Memorandum, which was issued about a year before 18 U.S.C. § § 202-209 came into force, was to lay down rules and standards derived from the existing statutes for the guidance of agencies in their employment of part-time advisory personnel, including committee members. A paragraph headed "Industry, Labor or Agricultural Representatives" informed the agencies that" [i] t is occasionally necessary to distinguish consultants and advisers from persons speaking for a firm or an industry, or for labor or agriculture, or in some other representative capacity" and went on to state that a consultant or adviser is a person who serves as an employee, while an outside

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7 The term "employee" will be used hereafter to include an officer unless the context indicates otherwise.

8 See n. 6, supra.

9 3 C.F.R., 1959-1963 Comp. p. 818.

representative is not an employee and therefore not within the scope of the conflict-of-interest laws.[10]

On May 2, 1963, President Kennedy replaced the Memorandum of February 9, 1962, with one entitled "Preventing Conflicts of Interest on the Part of Special Government Employees" that reflected the intervening enactment of § § 202-209.[11] The new document essentially restated the paragraph described above and then added to it a list of five principles for use in making the determination it required. The revised paragraph and appended principles read as follows:[12]

INDUSTRY, LABOR, AGRICULTURAL OR OTHER REPRESENTATIVES

It is occasionally necessary to distinguish between consultants and advisers who are special Government employees and persons who are invited to appear at a department or agency in a representative capacity to speak for firms or an industry, or for labor or agriculture, or for any other recognizable group of persons, including on occasion the public at large. A consultant or adviser whose advice is obtained by a department or agency from time to time because of his individual qualifications and who serves in an independent capacity is an officer or employee of the Government. On the other hand, one who is requested to appear before a Government department or agency to present the views of a non-governmental organization or group which he represents, or for which he is in a position to speak, does not not act as a servant of the Government and is not its officer or employee. He is therefore not subject to the conflict of interest laws and is not within the scope of this memorandum. However, the section of this memorandum headed "[illegible] Standards of Conduct" sets forth rules of ethics by which he should be guided even though not in the status of a Government official, and the agency before which he appears should call that section to his attention.

The following principles are useful in arriving at a determination whether an individual is acting before an agency in a representative capacity:

(1) A person who receives compensation from the Government for his services as an adviser or consultant is its employee and not a representative of an outside group. However, the Government's payment of travel expenses and a per diem allowance does not by itself make the recipient an employee.

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10 Id., at p. 824. This paragraph was the first published expression by the Government of the difference in status of employee-advisers and representative-advisers under the conflict-of-interest statutes.

11 Id., at p. 834.

12 Id., at p. 842.

(2) It is rare that a consultant or adviser who serves alone is acting in a representative capacity. Those who have representative roles are for the most part persons serving as members of an advisory committee or similar body utilized by a Government agency. It does not follow, however, that the members of every such body are acting as representatives and are therefore outside the range of the conflict of interest laws. This result is limited to the members of committees utilized to obtain the views of non-governmental groups or organizations.

(3) The fact that an individual is appointed by an agency to an advisory committee upon the recommendation of an outside group or organization tends to support the conclusion that he has a representative function.

(4) Although members of a governmental advisory body who are expected to bind outside organizations are no doubt serving in a representative capacity, the absence of authority to bind outside groups does not require the conclusion that the members are Government employees. What is important is whether they function as spokesmen for non-governmental groups or organizations and not whether they can formally commit them.

(5) Where an adviser or consultant is in a position to act as a spokesman for the United States or a government agency—as, for example, in an international conference—he is obviously acting as an officer or employee of the Government. (emphasis added)

The second Presidential memorandum remained on the books as such until 1965 when it was rescinded by operation of a provision in President Johnson's Executive Order 11222 of May 8, "Prescribing Standards of Ethical Conduct for Government Officers and Employees."[13] Section 601 of the Executive Order delegated to the Civil Service Commission (the ancestor of the Office of Personnel Management) the statutory authority of the President to establish regulations for the conduct of persons in the civil service. Section 701(a) directed the Commission to issue "appropriate regulations and instructions" to implement the standards of conduct, etc. set forth in the Order for observance by the agencies and employees of the Government. Section 703(e) rescinded the Memorandum of May 2, 1963, effective the date of the Commission's issuance of regulations under § 701(a). Those regulations were published October 1, 1965.[14]

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13 3 C.F.R., 1964-1965 Comp. p. 306.

14 30 Fed. Reg. 12529.

In pursuance of an understanding with interested agencies at the time Executive Order 11222 was drafted, the Civil Service Commission on November 9, 1965, reinstated the most significant portions of the May 2, 1963, Memorandum, including the provisions quoted above. It did so by publishing them as instructions of Government-wide applicability in the form of Appendix C. Thus, those instructions, although no longer clothed in the raiment of a presidential command, have their original force since they were issued by the Commission (and are maintained by the Office of Personnel Management) in the exercise of expressly delegated presidential authority.

2. Comparison between Distinction Made in Appendix C and Definitions That Apply in Title 5, United States Code

The proscriptions of 18 U.S.C. § § 202-209 apply to a person who serves the Executive Branch only if he or she acts in the capacity of an "officer or employee" of the Government.[15] However, none of these sections of the criminal code nor any other of the penal laws contains a definition of that term as it stands by itself or as modified in various ways in § § 202-209. On the other hand, 5 U.S.C. § § 2104 and 2105 define "officer" and "employee" respectively and are instructive here. They provide that for the purposes of Title 5, a person is regarded as an officer or employee of the United States if he (1) is appointed by a federal officer or employee, (2) is engaged in the performance of a federal function under law and (3) is subject to the supervision of a federal officer or employee.

The first criterion of § § 2104/5, a formal appointment, is met in Appendix C by paragraphs (a) - (d), which contain detailed rules for "obtaining and utilizing the services of . . . temporary or intermittent employee[s]." Paragraph (e) makes those rules applicable in the case of an advisory committee member who is serving in an independent capacity:

> (e) When a person is serving as a member of an advisory committee, board or other group, and is by virtue of his membership thereon an officer or employee of the United States, the requirements of paragraphs (a), (b), (c) and (d) should be carried out to the same extent as if he were serving the sponsoring agency separately and individually.

The second requirement of the Title 5 definitions, that for an individual to be an employee he must be engaged in the performance of a federal function, is paralleled in Appendix C by the instruction that of the persons, including committee members, who serve the Government temporarily or intermittently, only those who do so in an independent capacity are its employees. To characterize an industry representative or the like as a federal functionary is a contradiction in terms. Although he may well furnish valuable information or advice to his host agency, that benefit to it does not produce the legal status of a federal employee for him any more than it would if he were to use the same material for the benefit of his private employer in a public speech or article that came to the agency's attention.

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15 See the first sentence of Subpart I, supra.

The third requirement of § § 2104/5, that to be an employee, an individual must carry on his duties under the supervision of another employee, is important in distinguishing the former's status from the status of an independent contractor who provides a service to an agency. The contractor is not hired under the civil service laws and is not subject to the supervision that inheres in an employee-supervisor relationship in the civil service. More to the point, he is not an employee for the purposes of 18 U.S.C. § § 202-209.[16]

The third factor is not important with respect to advisory committees because in contrast to business organizations, universities, research foundations and other permanent entities able to carry out advisory activities, committees are rarely brought into the service of an agency by means of a contract. However, it is worthwhile to mention an issue that could arise in connection with the conflict-of-interest statutes if an agency were to create an advisory committee and then enter into a contract with it or each of its members individually. The issue is whether the agency would in practice exercise supervision over the operations of the committee and the formulation of judgments by its members that was great enough to taint the contract as a device for concealing their true status as SGE's under § § 202-209.[17] If an agency, for example, were to convene a committee and award the members a contract pursuant to which they (1) produced, after independent study, an advisory paper dealing with a problem that the agency's staff was too busy to resolve on its own and (2) delivered the paper without antecedent clearance from the staff or agency head, the committee members would properly have been deemed contractors. However, if the committee worked routinely subject to the scrutiny of the staff and with a significant amount of guidance from it, the members would be open to the charge that they actually served as SGE's and were subject to § § 202-209. As appears from these examples, the question is one of degree.[18] The same is true in other areas of the law where the distinction between an employee and an independent contractor is recognized.[19]

Returning to Appendix C, it is fair to say that its precepts for determining whether a member of a committee is to be classified as an employee of the United States, and therefore become subject to the constraints of § § 202-209, are validated by the definitions of "officer" and "employee" in the civil service code.

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16 Cf. B. Manning, Federal Conflict of Interest Law 32 (Harvard U. Press 1964). See also 37 Op. A.G. 204 (1933).

17 B. Manning, supra, at 32.

18 Id.

19 See, for example, United States v. Orleans, 425 U.S. 807 (1976) (tort claims); NLRB v. Hearst, 322 U.S. 111 (1944) (labor).

Once the sponsoring agency of a committee has determined whether the members are to be employees or representatives, the agency must mark its records accordingly. If the members are to be carried as employees, either with or without compensation, the agency must also classify them on its records either as SGE's or regular employees, depending on the expected frequency and duration of their periods of duty.20

3. Individuals Outside the Government Who Advise an Official Informally

A federal official may occasionally receive unsolicited, informal advice from an outside individual or group of individuals regarding a particular matter or issue of policy that is within his official responsibility. Or he may himself bring up an agency matter or policy issue informally with one or more outsiders in order to obtain their views. An incident of this sort sometimes prompts the inquiry whether the outsiders have become SGE's of the agency. In general, the answer is that they have not, for they are not possessed of appointments as employees nor do they perform a federal function.

However as so often happens in considering the applicability of the conflict-of-interest laws, a generality is insufficient here and a caveat is in order. An official should not hold informal meetings more or less regularly with a non-federal individual or group of individuals for the purpose of obtaining information or advice for the conduct of his office. If he does so, he may invite the argument that willy-nilly he has brought them within the range of 18 U.S.C. § § 202-209. The following passage from Manning's Federal Conflict of Interest, at pp. 29-30, makes the point well:

> . . . One does not become an "employee of the United States" merely by voicing an opinion on government matters to a federal official at a cocktail party. The distinction may be shadowy in a particular case, and each situation must be judged on its own facts. Formalities can play an important part. In the ordinary situation, a person will not be considered to be a consultant-employee if he does not bear a formal appointment, is not enrolled on the personnel roster of the relevant agency, has no government personnel file in his name, and has not been sworn in or signed the customary oath of a government employee. Other factors that might be relevant can be conjectured. Is the person's advice solicited frequently? Is it sought by one official, who may be a personal friend, or impersonally by a number of persons in a government agency that needs expert counsel? Do meetings take place during office hours? Are they conducted in the government office, and does, perhaps, the adviser maintain a desk or working materials in government facilities?
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> Of recent years, careful counsel have become increasingly conscious that the edges of the government employment relationship are blurred and that relatively little contact with government operations may be needed to open the risk of classification as an "employee of the United States" subject to the disabilities of the conflict of interest laws.

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20 Appendix C, paragraphs (a) - (e).

FEDERAL ADVISORY COMMITTEE ACT (FACA)

FACA is of interest here mainly because of its recognition that in addition to Congress, not only the President but also the heads of departments or agencies have the inherent power to establish advisory committees.[21] Although specifying necessarily different formal procedures for the establishment of the three types of committees, the Act makes no substantive distinctions among them relative to their powers or functions. On the other hand, it requires with respect to all three that membership "be fairly balanced in terms of the points of view represented and the functions to be performed by the committee."[22] This language asserts a standard of fairness but is short of being a command that every advisory committee must consist of individuals who represent the interests of persons or entities outside the Government.

EXAMPLES OF ADVISORY COMMITTEES

Federal advisory committees were few in number before World War II but have since become more widely used, especially in large departments and agencies with complex programs. Congress is responsible for the creation of an appreciable number of them, notably in the collection of agencies that now comprise the Department of Energy. It will be useful to examine a few congressionally-founded committees located there and elsewhere, along with others brought into being by the President or department heads, in order to differentiate those whose members are not employees of the United States from those whose members are in that class.

Energy Research Advisory Board (ERAB)

[illegible] of Energy is authorized by the provisions of 42 U.S.C. § 7234 (Supp. [illegible] in accordance with the Federal Advisory Committee Act such advisory committees as he may deem appropriate." The statute provides authorization for the Secretary to pay the travel expenses of committee members but omits authorization for compensating them.

Section 7234 contains a provision making 15 U.S.C. § 776, an earlier piece of energy legislation, applicable to advisory committees chartered by the Secretary or transferred to his department. Section 776 requires that the Secretary

> endeavor to insure that each [of his advisory committees] is reasonably representative of the various points of view and functions of the industry and users affected, including those of residential, commercial and industrial consumers, and shall include, where appropriate, representation from both State and local governments, and from representatives of State regulatory utility commissions, selected after consultation with the respective national associations.

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21 5 U.S.C. App. I, § 3(2).

22 5 U.S.C. App. I, § 5(b)(2) and (c).

ERAB is a committee organized under 42 U.S.C. § 7234, as supplemented by 15 U.S.C. § 776, and the Secretary's notice of establishment embodies language similar to that quoted above.[23] It is apparent therefore that ERAB is a body of persons who, in the language of Appendix C "speak for firms, or an industry, or for labor or agriculture, or for any recognizable group of persons, including, on occasion, the public at large."[24] Accordingly, the members of ERAB are not federal employees (SGE's) and not within the coverage of 18 U.S.C. §§ 202-209.

The following admonition that appears in Appendix C, at C-5, should be borne in mind by the Department of Energy with regard to ERAB and other representative advisory committees, as well as by other departments and agencies that utilize committees of that kind:

> . . . [A]n advisory group may of necessity be composed largely or wholly of persons of a common class or group whose employers [or clients] may benefit from the advice given . . . In all these circumstances, particular care should be exercised to exclude his employer's or client's contracts or other transactions with the Government from the range of the . . . adviser's duties.

Solar Photovoltaic Energy Advisory Committee (SPEAC)

SPEAC, which also serves the Secretary of Energy, differs in its origin from ERAB since it is a committee established directly by Congress, 42 U.S.C. § 5583 (Supp. III), rather than by a department or agency head under authority given by Congress. SPEAC has 13 members, including 11 appointed by the Secretary from "industrial organizations, academic institutions, professional societies or institutions, and other sources as he sees fit," and two members of the public appointed by the President. These provisions of themselves do not characterize SPEAC as a representative committee. However, 42 U.S.C. § 5588(d) provides that 42 U.S.C. § 7234, the statute under which ERAB was organized and which brings 15 U.S.C. § 776 into play, is applicable to SPEAC, thus making it possible for the Secretary to organize it as a representative committee, like ERAB. In fact, the Department of Energy has made SPEAC a separate component of ERAB.[25]

Federal Photovoltaic Utilization Program Advisory Committee (FPUPAC)

FPUPAC was a temporary committee created by legislation, 42 U.S.C. § 8277 (Supp. III), with a termination date of October 1, 1981. It was composed of the heads of certain federal departments and agencies specified by Congress plus other persons selected by the Secretary of Energy, whom it served. FPUPAC is included in this list of examples to contrast its nonfederal membership with that of SPEAC. Congress did not invoke the provisions of 42 U.S.C. § 7234 and 15 U.S.C. § 776 in founding FPUPAC. It went no further than instructing the Secretary to appoint non-governmental persons

> to the extent necessary to assure that the membership of the committee will be fairly balanced in terms of the point [sic] of view represented and the functions to be performed by the committee.

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23 43 Fed. Reg. 24130, June 2, 1978.

24 Page 2 footnote 6 supra.

25 Letter from the Secretary of Energy to Anthony W. Adler, dated May 12, 1980.

This language was taken from § 5(b)(2) of the Federal Advisory Committee Act and, as stated above, does not call for setting up a representative committee. In its notice of the establishment of FPUPAC, the Energy Department made the following statement:[26]

> The advice and recommendations of the Advisory Committee will not be inappropriately influenced by...any special interest, but will instead be the result of the Advisory Committee's independent judgment (emphasis added).

The non-federal members of the committee were therefore SGE's of the Energy Department during their service and were within the reach of 18 U.S.C. § § 202-209.

High Energy Physics Advisory Panel (HEPAP)

DOE/NSF Science Advisory Committee (SAC)

These Department of Energy committees established by the Secretary are of particular interest because their respective members have been directed to act as independent advisers rather than in the representative fashion spelled out by 42 U.S.C. § 7234 cum 15 U.S.C. § 776. The Secretary has written the persons appointed to either of the committees as follows:[27]

> ...each member is asked to serve as an individual, to exercise his judgment in the best interests of the national [program of his committee] and not to represent any special or parochial interests.

This instruction places the members of the committees in the ranks of the SGE's and thus binds them by the prescriptions of § § 202-209. Since the language of 15 U.S.C. § 776, supra, is precatory in essence, it does not preclude the Energy Department from the issuance of the instruction.

Intergovernmental Advisory Council on Education (IACE)

IACE is included as an example of a Congressionally ordained committee all of whose members are appointed by the President. It was originated by 20 U.S.C. § 3423 (Supp. III), a provision of the Department of Education Organization Act, for the purpose of providing assistance and recommendations to the President and the Secretary of Education. The committee has 20 members of whom six must be elected state and local officials, five must represent "public and private elementary and secondary education," five must represent "public and private postsecondary education" and four are members of the public, "including parents of students and students." In making his appointments the President is required to consult with representatives of the groups from which the four clusters of members are to be selected. These statutory directives are clear indicia that IACE is a representative body. Cf. Appendix C.

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26 44 Fed. Reg. 27234, May 9, 1979.

27 E.g., letters to Dr. Martin L. Perl, of HEPAP, dated Nov. 5, 1981, and Prof. Herman Feshbach, Chairman, SAC, dated Mar. 16, 1981.

National Professional Standards Review Council (NPSRC)

The charter of this body is § 1163 of the Social Security Act, as amended, 42 U.S.C. § 1320c-12. NPSRC consists of 11 physicians not otherwise in the employ of the United States who are appointed by the Secretary of Health and Human Services. The specifications of § 1163 for membership are such as to make the 11 physicians the representatives of their practicing colleagues throughout the nation. Nevertheless the members are employees of the Government because § 1163 provides that they are entitled to receive compensation at a daily rate not in excess of that of GS-18. The factor of compensation is decisive.[28]

President's Commission on Housing (PCH)

This advisory committee was brought into being by the President on his own by means of Executive Order 12310 of June 17, 1981. Section 2 provides simply that it is to have "not more than twenty-two (22) members from private life and from state and local governments who shall be appointed by the President." The Order, which in general instructs PCH to advise the President and the Secretary of Housing and Urban Development concerning the development of a national housing policy, directs that the members serve without compensation but with payment for travel expenses.

Despite the lack of pay for their work, it is evident that the members of PCH are employees of the Government. There is nothing in the Executive Order to characterize them as representatives of outside interests and it is unquestionable that they perform a federal function.

National Petroleum Council (NPC)

NPC is one of the oldest non-statutory advisory committees now functioning. It presently serves the Secretary of Energy but was created by the Secretary of the Interior in 1946 "as a source for advice on all matters related to oil and gas."[29] Its membership is drawn for the greatest part from the petroleum industry and is representative of the industry's various segments.[30]

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28 See n. 10, supra.

29 Metcalf v. National Petroleum Council, 553 F. 2d. 176, 177 (C.A.D.C. 1977). This case, in which the plaintiff attempted to raise an issue under the "fairly balanced" membership requirement of FACA, § 5(b)(2), was disposed of by the Court on the ground that the plaintiff had no standing to sue.

30 Id., at 179.

Since the Interior Department deliberately set up NPC as a representative advisory committee and did not provide compensation to its members, it never considered them to be federal employees. This position was confirmed by the Justice Department in 1962, while the forerunners of 18 U.S.C. § § 202-209 and President Kennedy's Memorandum of February 9, 1962, supra, were still in force.[31]

Labor Research Advisory Council (LRAC)

Business Research Advisory Council (BRAC)

These councils were formed by the Secretary of Labor in an exercise of his inherent powers of management—i.e., without statutory command or authorization—to advise the Commissioner of Labor Statistics in his Department.

The Secretary's notice of the establishment of LRAC states:[32]

> Council membership and participation in the Council and its committees are broadly representative of the union organizations in the United States. These include representation from organizations of all sizes of membership, with national coverage which reflects the geographical, industrial sectors of the economy.

This pronouncement characterizes LRAC's membership as representational and places it beyond the thrust of § § 202-209.

The notice of establishment of BRAC presents a contrasting description of membership:[33]

> Council membership is selected to assure a technically competent group of economists, statisticians and industrial relations experts who represent a cross section of American business and industry. The members serve in their individual capacities, not as representatives of their companies or organizations.

Whatever the degree of contradiction produced by the use of "represent" in the first sentence, the second sentence fixes the status of BRAC's members. They are employees of the Labor Department and subject to the restraints of § 202-209 on SGE's.

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31 Letter from Deputy Attorney General Katzenbach to Assistant Secretary of the Interior Kelly, Aug. 11, 1962.

32 45 Fed. Reg. 80599, Dec. 5, 1980.

33 Id.

CONCLUSION

From the foregoing discussion, it will be seen that Congress, the President and the heads of Executive departments and agencies all have the power to establish advisory committees. Incident to each exercise of that power, the host department or agency of a committee must determine whether the non-federal members will or will not be employees of the United States for the purposes of 18 U.S.C. § 202-209 and, if employees, whether they will or will not be SGE's. Passing the payment of compensation, which entails employee status, whether that status or the alternative is intended by Congress, the President or a parent department or agency is to be ascertained from the language used in the enabling legislation, Executive Order, committee charter or other pertinent document to describe the role of the committee members. The choices are two: (1) the use of words to command the members to exercise individual and independent judgment, or (2) the use of words to characterize them as the representatives of individuals or entities outside the Government who have an interest in the subject matter assigned to the committee. Where the language does not articulate a deliberate choice, it is fair to conclude that a member is an employee of the United States, for that is the usual status of someone appointed by an officer or agency of the Government to serve it. See the example of the President's Commission on Housing, supra at p 12.

General Services Administration
National Archives and Records Service Washington, DC 20408

Date : September 26, 1983

Reply to Attn of : Ronald L. Martinson

Subject: Reporting Costs for the Annual Report on Federal Advisory Committees

To : Committee Management Officers

There is an old saying that one can prove anything with statistics. But when it comes to statistics that are reported in the annual report on Federal advisory committees, what GSA really wants to prove is that the report is an accurate reflection of advisory committee activity throughout executive branch departments and agencies.

The detailed use and analysis of statistics furnished for the Eleventh Annual Report covering calendar year 1982 underscored the need for greater uniformity in reporting procedures. Some departments and agencies account for and report direct and indirect costs associated with operating their advisory committees, while others may not achieve that level of detail.

It is important that when comparing agencies and their advisory committees there be some uniformity in accounting and reporting procedures, so that a true picture of performance and activity can be obtained. Nevertheless, the current system did not arrive overnight, and change should be made with careful study and deliberation.

Accordingly, as a separate subcommittee of the handbook task force that has been established, we are going to seek the assistance and input of all Federal departments and agencies in reviewing cost reporting procedures for advisory committees and developing a more uniform system to be applied in future years. For the report due for fiscal year 1983, we are requesting your cooperation and assistance in reporting advisory committee costs as completely and accurately as possible. And, we invite you to participate in the subcommittee on advisory committee costs which will be initiated in conjunction with the handbook project. To join the subcommittee or for additional information on this matter, please contact Bob Tarr at our office on 523-4884.

With every best wish.

Sincerely,

RONALD L. MARTINSON
Special Assistant to the Archivist
(Committee Management)

May 24, 1984

MEMORANDUM

SUBJECT: Recommendations of the Subcommittee on Uniform Cost Reporting

FROM: Mary Beatty
President, Federal Advisory Committee Management Association

TO: Ron Martinson
Committee Management Secretariat, GSA

As you requested in your memorandum of September 26, 1983, a group of concerned Federal committee management officers have banded together to help develop a more uniform and accurate system of reporting costs of advisory committees. It has been a real concern to us that some agencies were shown as "big spenders" in the Annual Report of the President on Federal Advisory Committees because they were reporting items such as building rental costs and utilities, whereas other agencies showed minimal expenditures because they were not including costs such as secretarial, clerical and administrative duties.

As you stated, "there is an old saying that one can prove anything with statistics". Thus in order to present a more accurate reflection of advisory committee expenditures, we have determined that the most realistic approach is to include only those direct costs which would be eliminated if the committee were terminated. This approach is consistent with previous OMB instructions (copy attached). Therefore, we believe it will be necessary to indicate in the instruction sheet examples of items that should be included as well as those that should be excluded as indirect costs.

The Subcommittee on Uniform Cost Reporting finalized their recommendations on the current GSA Form T-820B, Review of Federal Advisory Committee, at a May 9 meeting of the Federal Advisory Committee Management Association. We have attached the recommendations for your review and consideration in making the necessary revisions before the next data collection period covering fiscal year 1984. A prototype of the revised form is attached. If you would like to discuss the recommendations in detail, a representative group consisting of Ann Bailey, John Wilson, Becky Winkler and myself would be glad to meet with you at your convenience. Please be assured that the committee management community appreciates your willingness to utilize our varied experience to help find a reasonable solution to this problem so we can have more realistic comparison data in the Annual Report next year.

Mary

Attachments
Recommendations
Revised Form
OMB Memo dated 12/17/76

SUBCOMMITTEE ON UNIFORM COST REPORTING

The Subcommittee's general recommendations are followed by specific recommendations which are listed in the same numerical sequence as the current GSA Form T-820-B, Review of Federal Advisory Committee.

General Recommendations

1. Form or mailout must include instructions and/or definitions for completing each item, especially 21E and proposed 22C. The latter item should include only those direct costs which would be eliminated if the committee were terminated. For example, printing, rental of meeting facilities, stenographic reporting and transcripts, special studies, other management and logistical support.

Indirect costs (commonly known as overhead) that would be continued even if the committee were terminated should not be reported. For example, building rental, utilities, telephones, mail, messenger service, supplies and materials, reproduction (xeroxing).

Justification: to reduce confusion and achieve uniformity of results. To make comparisons between committees more realistic and provide truer picture of actual costs.

2. Do not include prorated Federal staff compensation or FTE if it is less than 25% of one staff-year. (These are proposed items 22A and 23.)

Justification: Conforms to informal GSA guidelines.

3. Except for statutory committees, complete proposed item 25 each year, using latest GSA Annual Review with cover letter for renewal consultation, supplemented by any material agency believes is necessary.

Justification: Eliminate unnecessary paperwork and duplication of effort at renewal time; reduce staff time for renewal. Use completed Review in response to any inquiries.

Specific Recommendations

Item 15

Recommendation: Delete block marked grant review.

Justification: Term is redundant because it is covered under scientific/technical category.

Recommendation: Check more than one block if appropriate.

Justification: Allows more accurate description of committee's work.

Item 18

Recommendation: Eliminate item.

Justification: Applies to members, not committee.

Fallback recommendation: Delete number of months of term (item in italics).

Justification: Misleading because of extensions, varying terms. Basically irrelevant information.

Item 20C

Recommendation: Eliminate item.

Justification: Confusing to Federal staff and public; misleading; available on GSA computers if required.

Item 21E

Recommendation: Provide specific instructions on counting subcommittee and full committee meetings.

Justification: See general recommendation number one.

Item 22A

Recommendation: Delete A(2) and B; revise as below:

(1) Members. (Change.)
(2) Federal staff. (Change.)
(3) Non-member consultants. (Change.)

Justification: A(2) - Not relevant to distinguish between Federal and non-Federal members. In most cases, compensation of Federal members will not be reported (consistent with general recommendation #2) because (a) most Federal members contribute an insignificant portion of their time and (b) most are paid by an agency other than the committee's sponsoring agency.

B - More accurate description.

Item 22C

Recommendation: Renumber as 22B. Revise as follows to correspond with proposed 22A:

(1) Members.
(2) Federal staff.
(3) Non-member consultants.

Justification: Consistency. Travel and per diem for Federal members will be reported if they are part of the committee's budget.

Item 22D

Recommendation: Delete.

Justification: Not sufficiently significant to highlight, but will be included with proposed 22C below.

Item 22E

Recommendation: Renumber 22C. Include all other direct costs without itemizing. See general recommendation number one.

Justification: Uniformity of reporting.

Section E

Delete instructions immediately following and under heading.

Item 24

Recommendation: Revise as follows:

Provide a narrative statement regarding committee's activities, contributions, and accomplishments,including as appropriate, such items as legislation, regulations, guidelines or agency rules proposed, eliminated, or changed as a result of committee deliberations or advice; significant service delivery or cost reductions resulting from committee advice; research support; policy and program advice.

Attach a separate sheet if more space required.

Justification: Allows agency discretion in describing accomplishments rather than forcing response to each category.

Item 25

Add instruction: Complete only for non-statutory committees recommended for continuation.

Recommendation: Revise as follows:

> Provide a justification for the committee, addressing each of the following. Attach a separate sheet if more space required.
>
> A. Explain why committee is essential to the conduct of agency business and in the public interest.
>
> B. Explain why committee's functions cannot be performed by the agency, another existing advisory committee, or other means.
>
> C. Describe the balance of membership in terms of points of view represented and functions performed.

Justification: Follows GSA interim regulation requirements for renewal. See general recommendation number three.

REVIEW OF FEDERAL ADVISORY COMMITTEE

REPORTS CONTROL NO.: 0304-GSA-OT

INSTRUCTIONS: Complete one form for EACH committee in existence at any time during fiscal year *(10-1 to 9-30)*. Cite ALL dates in numerals *(Month, day, year)*. If additional space is necessary, use Section F, "Remarks" on the reverse and key answers to item numbers or attach separate sheets and include Items 1, 2 and 3 on each sheet.

1. DEPARTMENT OR AGENCY

2. FISCAL YEAR

3. NAME OF COMMITTEE

SECTION A – COMMITTEE STATUS *(Complete this section for ALL committees)*

4. IS THIS COMMITTEE NEW DURING FISCAL YEAR?	5. CURRENT CHARTER DATE	6. EXPECTED RENEWAL DATE	7. EXPECTED TERMINATION DATE
☐ YES ☐ NO			

8A. HAS THIS COMMITTEE BEEN TERMINATED DURING FISCAL YEAR? *(If "YES," complete Items 8B and 8C)*	8B. SPECIFIC TERMINATION AUTHORITY *(If by law, cite U.S.C.)*	8C. ACTUAL TERMINATION DATE
☐ YES ☐ NO		

NOTE: If box 8B or 8C is checked, complete Items 10A and 10B and provide a brief explanation in "Remarks".

9. AGENCY RECOMMENDATION FOR COMMITTEE FOR NEXT FISCAL YEAR	10A. IS LEGISLATION REQUIRED TO MERGE OR TERMINATE?	10B. IS SUCH LEGISLATION PENDING OR ENACTED?
☐ A. CONTINUE ☐ B. MERGE ☐ C. TERMINATE	☐ YES ☐ NO	☐ YES ☐ NO

SECTION B – COMMITTEE AUTHORITY AND TYPE *(Complete this section for ALL new committees and give brief statement of functions in "Remarks". If any information previously submitted on a continuing committee has changed, update and/or correct all items that apply.)*

11. ESTABLISHMENT AUTHORITY *(Check ONLY one)*
☐ SPECIFICALLY DIRECTED BY LAW ☐ AUTHORIZED BY LAW ☐ AGENCY AUTHORITY ☐ PRESIDENTIAL DIRECTIVE

12. SPECIFIC ESTABLISHMENT AUTHORITY *(If by law, cite U.S.C.)*	13. EFFECTIVE DATE OF AUTHORITY	14. COMMITTEE TYPE *(Check EITHER A or B, and C, if appropriate)*
		☐ A. AD HOC ☐ B. CONTINUING ☐ C. PRESIDENTIAL

15. DESCRIPTION OF COMMITTEE *(Check more than one block if appropriate)*
☐ MAJOR NATIONAL POLICY/ISSUE ADVISORY ☐ PROGRAM ADVISORY ☐ SCIENTIFIC/TECHNICAL ☐ OTHER *(Specify)*

16A. BASIS FOR COMPENSATION OF MEMBERS	16B. STATUTE *(U.S.C.)*	16C. RATE PER MEMBER *(Per day)*
☐ AGENCY AUTHORIZATION ☐ STATUTORY *(If statutory, complete Item 16B)*		$

17. TYPE OF COMMITTEE APPOINTMENT *(Check ALL that apply)*	18. LENGTH OF APPOINTMENT
☐ PRESIDENTIAL ☐ AGENCY HEAD ☐ CONGRESSIONAL ☐ OTHER *(Specify)*	☐ INDEFINITE ☐ SPECIFIC TERM

SECTION C – COMMITTEE ACTIVITY DURING FISCAL YEAR *(Complete this section for ALL committees)*

19. TOTAL NUMBER OF REPORTS *(Note: List report titles and dates in "Remarks".)*	20. NUMBER OF MEMBERS			
	A. BEGINNING *(10-1)*	B. ENDING *(9-30)*	C. AUTHORIZED	D. COMPENSATED

21. MEETINGS

NOTE: Meeting exemptions – For closed or partially closed meetings, list all Government in the Sunshine Act (5 U.S.C. 552b) exemptions, and number of times used in "Remarks".

NUMBER OF MEETINGS				E. DATES OF ALL MEETINGS *(Month, day)*
A. OPEN	B. CLOSED	C. PARTIALLY CLOSED	D. TOTAL *(A+B+C)*	

SECTION D – COMMITTEE COST *(Complete this section for ALL committees)*

NOTE: Express costs in whole dollars. DO NOT use decimals, K, M, N/A, or leave blank. Indicate "0", if applicable)

22. DESCRIPTION		CURRENT FISCAL YEAR *(Actual)*	NEXT FISCAL YEAR *(Estimated)*
A. COMPENSATION	(1) Members	0	0
	(2) Federal Staff		
	(3) Nonmember consultants		
B. TRAVEL AND PER DIEM	(1) Members	0	0
	(2) Federal Staff		
	(3) Nonmember consultants		
C. OTHER		0	0
	D. TOTAL	0	0
23. FEDERAL STAFF SUPPORT YEARS *(Express in person-years using decimals to the nearest hundredth (e.g., 0.00). Figure should correspond to dollar cost in Item 22A(2), above.)*			

SECTION E — COMMITTEE ACCOMPLISHMENTS AND JUSTIFICATION

24. ACCOMPLISHMENTS

Provide on separate sheets a narrative statement regarding the committee's activities, accomplishments, and contributions. Include as appropriate such items as: legislation; regulations; guidelines; or Agency rules proposed, eliminated, or changed as a result of committee deliberations or advice. Also include significant service delivery or cost reductions resulting from committee advice; research support activities; and program advice.

25. JUSTIFICATION

Complete only for nonstatutory committees recommended for continuation. Provide on separate sheets a justification for the committee addressing each of the following:

A. Explain why the committee is essential to the conduct of Agency business and in the public interest.

B. Explain why the committee's functions cannot be performed by the Agency, another existing advisory committee, or other means.

C. Describe the balance of membership in terms of points of view represented and functions performed.

SECTION F — REMARKS

26. Remarks

EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF MANAGEMENT AND BUDGET
WASHINGTON, D.C. 20503

December 17, 1976

MEMORANDUM FOR COMMITTEE MANAGEMENT OFFICERS

FROM: William E. Bonsteel WB
Committee Management Secretariat

SUBJECT: Costs of Federal advisory committees

It has become apparent that there are inconsistencies between, and sometimes within, agencies and departments in the reporting and estimating of costs of Federal advisory committees. To remedy this problem, attached, for your guidance, is a list of the items that should be included, by all departments and agencies, and separately established (independent) advisory bodies, in reporting or estimating the costs of each committee.

The attached guidelines do not change present reporting requirements. For example, the Standard Form 248 submitted to GSA for the Annual Report of the President should include separate single figures for current-year and for next-year costs of each advisory committee -- but those figures should include the items listed on the attachment to this memorandum, and the agency should maintain whatever documents are necessary to show how those total figures were reached, and what items are included.

These guidelines should be put into effect immediately. However, as you know, agency submissions for the Annual Report of the President are due to GSA on or before January 15, 1977. Do not delay these submissions in order to change the method of determining costs of committees, but make necessary changes as soon thereafter as possible.

If you have any questions, please contact CMS, telephone 395-5193 (code 103).

Attachment

ADVISORY COMMITTEE COST GUIDELINES

An estimate, or report, of the costs of an advisory committee should include the direct obligations for the following items:

- Personnel compensation of committee members, consultants to the committee, all permanent and temporary or part-time (GS, WB, or other) positions which are a part of or supportive to the committee, and all overtime related to committee functions.

NOTE: Personnel compensation should reflect all (actual or estimated) person-years, or parts thereof, of Federal positions devoted to a particular committee's activities. It should also include the compensation of Federal employees assigned to committees, on a reimbursable or nonreimbursable basis, from agencies or departments other than that to which the committee reports.

- Personnel benefits 1/ associated with the above compensation.

- Travel costs (including per diem) of committee members, consultants, and all permanent, and all temporary or part-time positions which are a part of, or supportive to, the committee.

- Transportation of things, communications, and printing and reproduction.

- Rent for additional space acquired for committee use.

- Other services required by the committee, including data processing services, management studies and evaluations, contractual services, and reimbursable services.

- Supplies and materials, and equipment, acquired for committee use.

1/ May be derived by using the agency-developed cost as a percentage of basic payroll used in reporting under OMB Circular No. A-93, "Reports on man-years and personnel costs for Federal civilian employment."

Costs not to be included:

- Indirect, or overhead, costs should not be included.
- The costs of the committee management system (agency Committee Management Officers, etc.) should not be ascribed to, or allocated among, individual committees.

TESTIMONY OF RICHARD A. WEGMAN

ON BEHALF OF THE CHARLES F. KETTERING FOUNDATION

BEFORE THE U.S. SENATE COMMITTEE ON GOVERNMENTAL AFFAIRS

SUBCOMMITTEE ON INFORMATION MANAGEMENT

AND REGULATORY AFFAIRS

June 21, 1984

Mr. Chairman and Members of the Committee:

It is a great pleasure to appear before you this afternoon. I am appearing on behalf of the Charles F. Kettering Foundation and its President, Dr. David Mathews, to describe the Foundation's work on federal advisory committees, and to briefly summarize the recommendations and conclusions of the Foundation's report. I understand the Foundation's Report entitled "The Utilization and Management of Federal Advisory Committees" has already been made available to the Committee.

Background of the Foundation's Study

Early in 1981, the Kettering Foundation decided to undertake a general review of the effectiveness of federal advisory committees. In the Foundation's view, federal advisory committees are a focal point for citizen

participation in government; they provide an opportunity for more than 20,000 citizen members to contribute actively to the decision-making process of government.

The Foundation commissioned its study in May 1981. In conducting our work, we surveyed approximately 300 agency executives, program officers, and current and former advisory committee members. A 10-page questionnaire was sent to 60 federal committee management officers, and to more than 200 present and former advisory committee members. Questionnaire recipients included ranchers, housewives, scientists, physicians, architects, professors of government, state and local public officials, and other public figures. Of the committee members, a majority of respondents had served as chairman.

The questionnaire -- and accompanying interviews -- sought members' views on the general operation of advisory committees, the adequacy of resources, the relationship between the committee and its sponsoring agency, the qualifications and diversity of committee members, the adequacy of members' orientation and training, and the functioning of the Federal Advisory Committee Act, particularly the open meeting and balanced membership requirements. Responses from committee management officers focused primarily on the requirements of the Federal Advisory Committee Act.

The Kettering Foundation also held a conference in 1981 at Coolfant, W.Va., to conduct an interchange between former advisory committee members and current government officials. Participants considered how the work of advisory committees could be better utilized by sponsoring federal agencies. They also considered the extent to which professional background, geographical diversity, and political philosophies of individuals should be taken into account in making committee appointments. The Foundation subsequently submitted suggested guidelines on this issue to the Justice Department.

In June 1983, the Foundation issued its report on the Utilization and Management of Federal Advisory Committees. The report contains 29 recommendations for improving the management and operation of advisory committees, a number of which have been incorporated into GSA's interim rule adopted in mid-1983.

I would like to briefly review the general conclusions of the Foundation's report, and touch on just a few of the specific recommendations that relate to matters pending before your committee.

General

In general, the Foundation believes there is considerable room for improvement in the way federal

agencies and departments manage and utilize advisory committees. In addition, there is a need for better centralized management and guidance, and for increased Congressional oversight.

The Foundation strongly believes that the effort is worth undertaking. Advisory committees are an essential part of American government. Not only do they provide government officials with guidance and advice -- usually at a fraction of what private consultants would cost -- but they do so with a geographic and professional diversity that no private organization can possibly match. Equally as important, advisory committees provide the opportunity for large numbers of citizens -- 21,942 members in calendar year 1983 -- to participate actively in the decision-making process of government. Advisory committees offer what no other governmental institution can possible provide; the chance for citizens in communities across the land to become directly involved in programs and policies at the national level. For this involvement to be meaningful, though, advisory committees must function effectively, and the agencies to which they report must make intelligent use of the advice that they provide.

In the Foundation's view, the prime responsibility for improved management and utilization of advisory committees rests with the sponosoring agency. It is the sponsoring

agency's responsibility to determine an advisory committee's role, to develop a clear sense of mission for the committee, to seek out highly qualifiied individuals to serve on the committee, to provide all committees with adequate budget and staff resources, and to work closely with each committee to ensure that the advice and recommendations that emerge can directly assist the agency in discharging its statutory responsibilities.

The Fair Balance Requirement

The Federal Advisory Committee Act requires that each advisory committee be "fairly balanced in terms of the points of view represented and the functions to be performed by the advisory committee." (FACA, § 5(b),(c)). Although this requirement seems straightforward enough, the balanced membership issue has given rise to numerous questions about the nature and purpose of advisory committees, about the proper relationship between a central coordinating agency and the sponsoring agencies, and about the appropriate degree of overall guidance from a central authority in making advisory committee appointments.

In our survey, respondents were asked about the objectives to be achieved with the balanced membership requirement. More than 83% believed that diversity of professional experience should be taken into account in

making advisory committee appointments. Other factors regarded as important included representation of different geographical regions (66%); inclusion of women and different ethnic groups (49%); diversity of socioeconomic status (38%); representation of the "general public" (38%); and bipartisanship (36%). In achieving "fair balance," respondents stressed the importance of distinguishing among different types of committees. For example, those serving on peer review and technical committees believed that professional expertise and technical competence was of the utmost importance. Geographic balance and the inclusion of women and minorities were seen by many as desirable, but not at the expense of professional qualifications. On policy development committees, respondents observed that broader criteria would be appropriate, with ethnic, geographic and diversity accorded a relatively higher priority in achieving fair balance.

Two specific criticisms are worth stressing. First, several respondents complained about the lack of sufficent funds to reimburse committee members for travel, and the unwillingness of agencies to compensate members for the days lost in advisory committee participation. The policy of not compensating committee members can effectively skew advisory committee membership. The president of a major industrial company, for example, may charge expenses and time to his or

her company, while other private citizens may be unable to attend distant or lengthy meetings if compensation is not available. A member of one Department of Interior Advisory Committee told us:

> "I have attended 100% of those committee meetings for which travel expenses were paid. Finances kept me from attending more than 50% of the meetings where expenses were not paid ... if representatives of groups whose financing is not adequate are not reimbursed for expenses, they cannot participate. That fact alone makes a mockery of efforts to balance committee membership."

Second, a number of respondents -- both federal government employees and advisory committee members -- felt that in making committee appointments there were occasions where a "numbers game" was played. In particular, several officers stated in interviews that during the Carter Administration undue pressure had been applied to increase the numbers of women and minorities on advisory committees. Unfortunately, this on occasion led to "the inclusion of too many persons with inadequate background and knowledge to cope with the complexity of the issues." (Report, p. 199) Unquestionably, diversity of background is desirable for advisory committee membership, and every effort should be made to seek out qualified women and minorities to serve on advisory committees, but competence and ability must remain the foremost consideration in advisory committee appointments, particularly on technical and peer review committees.

The major recommendations of the Kettering Foundation for achieving fair balance are as follows:

(1) All appointees should have a minimum level of professional qualifications or relevant experience, including technical expertise wherever appropriate. This threshhold requirement should be observed in every case and for every committee. Guidelines issued by GSA should be redrafted to emphasize this point.

(2) The range of interests, disciplines, expertise and viewpoints to be considered in selecting a "balanced" committee membership should depend on the functions of each committee. For peer review and technical committees, technical competence and professional distinction may be the foremost criteria. Representatives of various subdisciplines or specialties may supply the necessary balance. For committees established to advise on policy, a broader range of interests, background, and training should be considered. There should be adequate representation of those concerns likely to be affected by the committee's recommendations.

(3) Requiring specific proportions of women, minorities, and ethnic groups on all advisory committees is not what Congress intended when it proposed the balance membership requirement. However, to the extent that women and minorities traditionally have not been involved or are not presently involved in the work of an agency, program, or advisory committee a special effort to select such people would be consistent with Congress' intent and should be encouraged, particularly on policy committees.

Establishment of New Committees

In our judgment, the chartering process required by the Federal Advisory Committee Act requires considerable improvement. The process should be streamlined to provide agencies with every incentive to use advisory committees

when they are needed. Unfortunately, the current process provides just the opposite incentive.

The nature of the chartering process seems designed for delay. The consultation begins at the GSA, where a request to establish a committee is reviewed for "facial sufficiency", that is, basic compliance with the law. This determination is to be made within 15 days, as Circular A-63 specifies. After its initial review, GSA forwards the request to OMB. OMB's budget examiners conduct an evaluation similar to that used for the annual comprehensive review. This phase of the consultation is where most decisions are actually made, since the budget examiners are better able to evaluate government programs and staff officers at GSA, and to determine whether a proposed committee duplicates an existing government program, or whether its proposed functions would best be handled by a different agency.

This process often consumes a considerable amount of time. It is not at all uncommon for it to take several months -- even for committees that are already in existence. In early 1983, for example, it required more than 100 days for EPA to reestablish its Federal Insecticide, Fungicide and Rodenticide Act advisory committee. The greatest delay seems to occur in the natural resources or environmental protection areas. In natural

resources, OMB budget examiners have notified agencies that they will accept and process a new committee charter only once a year; charter submissions at other times of the year are generally not processed. In the environmental area, according to committee management officers, the elapsed time for new or renewal committee charters averages between two and nine months.

If agencies respond to the bureaucratic delay and red tape of the chartering process by deciding that obtaining outside advice isn't worth the effort, the Act's basic intent of involving outside citizens in government decision making is frustrated. On the other hand, the Act is also frustrated if agencies "go underground", and convene advisory groups without complying with the Act's provisions. If the cumbersome and time consuming chartering process is mainly responsible for creating this attitude -- and it appears that it is -- then revising and streamlining this process should be a priority.

Several steps can be undertaken to improve this process. First, central management responsibility for advisory committees should be reconsolidated in a single agency. It makes little sense for one agency to review a charter for facial sufficiency with the Act, and for another to review it for potential overlap and duplication and to consider the issue of need. The reconsolidation could take

place either in GSA or OMB. If budget review is to take place at the time of chartering, it may make sense to have the Secretariat return to OMB. On the other hand, if the Secretariat is to remain at GSA, the office should be significantly upgraded within the agency, and staff increased accordingly.

Second, there is no basis in the Act or the legislative history for GSA to exercise concurrence authority. The Act states that the need for an advisory committee is to be "determined" by the agency, after "consultation" with the Secretariat. If Congress had intended to grant veto power over creation of advisory committees to the OMB, it could have found the words to say so. Absent such language, the agency's judgment as to need should be determinative. This is only logical, since the agency is in a far better position than the Secretariat to decide what advice will be helpful to it in discharging its statutory obligations.

Third, the review undertaken by the Secretariat prior to establishment should be limited to the issue of facial sufficiency. Is there an improper delegation of decision-making authority? Does the proposed group meet the definition of an advisory committee? These are issues that the Secretariat has the expertise to deal and on which agencies frequently need advice.

The other type of review -- the question of potential overlap and duplication with other advisory committees -- can be better performed at the back end of the process, at the time the Secretariat prepares its Annual Comprehensive Review. Postponing this review until the year end might mean that an occasional committee could be created that would have to be merged with another committee at a later date. This seems a small cost compared to the benefit that can be realized by steamlining the advisory committee chartering process.

Finally, the 15-day time period for consultation should be strictly adhered to. If the Secretariat does not respond with the recommendation in 15 days, the agency should be free to proceed with establishment of the committee. Such an approach should serve to further streamline the process, and encourage the Secretariat to give higher priority to agency requests for action.

The Problem of Ad Hoc Committees

Of all of the issues arising under the Federal Advisory Committee Act, one of the most difficult to resolve has been the problem of the ad hoc meeting -- a group of individuals who are brought together by a federal agency official on a one-time only basis, or perhaps even on an occasional basis -- to provide advice informally to the agency. If such a

meeting is subject to all of the requirements of FACA, including the cumbersome chartering process, agencies will be reluctant to seek out advice in this fashion, and the government will be the poorer for it. On the other hand, if such meetings are exempted entirely from the Act, this may invite abuse, as agencies use ad hoc meetings as a way to avoid the fair balance and open meeting requirements of FACA.

We believe this problem should be approached on a flexible basis. Where a meeting or series of meetings is likely to have a direct influence or impact on federal decision making or policy development, federal agencies should be under some obligation to seek a diversity of views, and to permit those with a stake in the decision to have access to the process. If this is not done, the spirit and purpose of FACA will be frustrated. The key test in determining covering should be, how much impact or influence on federal decisionmaking will the meeting or meetings likely have? If a specific policy or action is under review, if those who participate in the meeting have a direct stake in the outcome, and if a decision on the policy or action is imminent, then the balance should tip in favor of FACA coverage.

On the other hand, where no specific action is under consideration or the policy development process is in its

early stages, and where an informal non-recurring group is involved, an agency should be free to hold such a meeting without subjecting the group to the FACA requirements.

Our report suggests that the following factors be considered in assessing whether a single meeting or a few meetings with outside citizens held at the request of a federal department or agency should be subject to FACA:

- whether a specific action or policy decision is under consideration;
- whether the group will be asked for recommendations on the specific action or policy;
- whether the agency circulates materials or documents for review prior to the meeting;
- whether the citizens attending the meeting have a direct stake in the pending agency action or policy;
- whether the group plans to meet again with the federal official or department;
- whether there are clearly defined interests with differing points of view about the subject matter under discussion;
- whether the meeting is with a federal official of sufficient authority to take action on any advice or recommendations that may be offered; and
- whether the group of citizens has a fixed membership and formal organizational structure.

No one of these factors should be dispositive. If enough of these factors are present, the single meeting should be subject to FACA. If very few are present, there should be no formal obligation for the meeting to be open, or for the group to be chartered.

If several factors are present, and there is genuine doubt about the application of FACA to the meeting, the agency might follow an approach which would satisfy the spirit of FACA, but not necessarily all of its literal requirements. It might proceed with the meeting, as planned, and provide notice in the Federal Register of the meeting and the issues discussed. The agency could then provide an equivalent opportunity for other interested groups or individuals to meet with the agency to present their views on the issue under consideration. For such an "equivalency" approach to be meaningful, the subsequent meetings should be timely, and they should take place with the same federal official, or with another official of the same rank or status. Such a practical solution would modify the "either-or" approach that agencies use today in applying FACA.

* * * *

Mr. Chairman, we hope this brief summary of the Kettering Foundation's report is helpful to you and the members of the committee. We applaud your interest in conducting this much needed oversight of the Federal Advisory Committee Act. The Foundation stands ready to be of whatever service or assistance it can to help ensure that

federal advisory committees do in fact provide the opportunity for private citizens to participate actively and effectively in the decisionmaking processes of government; and, at the same time, to provide government officials with a highly qualified source of advice at a very reasonable cost.

RESPONSES TO QUESTIONS FROM SENATOR ROTH

1. In your testimony you recommend that central management responsibility for advisory committees be reconsolidated in a single agency. If this were to occur, how should the new central management authority be structured? If we were to take the existing Committee Management Secretariat (CMS) in GSA as a starting point, how would it be changed? What tasks should it carry out, what resources would be required, and how should the office be organized?

In the Foundation's view, principal responsibility for managing advisory committees should rest with the individual agency. It is particularly important for agencies to have a quick response from the central management agency (whether in GSA or OMB) on all requests for chartering new committees. If staff and resources allocated to the central management agency are inadequate to enable CMS to respond within the 15-day period specified in FACA, agencies may either ignore the requirements of the statute, or forego the opportunity to obtain outside advice from the public. In our view, either outcome is undesirable. The central management agency should be given whatever resources are required to enable it to respond to agency charter requests on a timely basis, and to carry out CMS' other responsibilities under the Federal Advisory Committee Act.

2. You make several suggestions intended to simplify the chartering process for new committees. How might the biannual charter review process be improved to ensure that committees that have completed their work or have fallen inactive are not rechartered? What criteria could be applied to a committee's work product and activity level to help determine whether or not its charter merits renewal?

Our report suggests that a committee should meet a sufficient number of times a year to ensure that it is able to adequately discharge its responsibilities, and to provide the necessary degree of continuity for its work. It is also essential, in our view, that there be adequate communication between the sponsoring agency and an advisory committee reporting to it. The committee's mission should be clearly set forth at the outset, and there should be feedback from the agency to the committee on its work, including face-to-face meetings between the committee and the appropriate agency official (e.g., the Assistant Secretary) on a periodic basis. If the committee fails to meet with sufficient frequency, if the agency is not prepared to allocate adequate resources to allow it to function, and if the necessary communication between agency and committee does not take place, there may be good reason not to renew the committee's charter.

However, instances may arise where an agency

has little interest in the advice a committee has to offer, but the larger interest of government may dictate that a committee continue to function. In such case, it may be appropriate to consider whether a committee should proffer its advice to a central executive branch agency (such as an agency located in the Executive Office of the President). Alternatively, it may be appropriate to have the committee provide its advice directly to a committee or subcommittee of the Congress, which can assist it in carrying out oversight responsibilities within its jurisdiction.

3. Concern has been expressed by some that compensation for advisory committee participation has been excessive. In your work on advisory committees, did you identify any abuses in the granting of compensation for advisory committee participation? Did you sense that agency administrator discretion for granting compensation is used wisely?

Our report did not consider the general question of granting compensation for advisory committee members. However, in our study of the FACA fair balance requirement, the report observed that compensation may have a bearing on this issue. For example, if an advisory committee member who happens to be an officer of a large corporation is compensated by his company for his time spent on advisory committee matters, while an

advisory committee member who is a teacher or a housewife does not have that opportunity, the teacher or the housewife may be unable to participate to the same degree as the corporate officer. This may effectively skew the input received by the advisory committee, and have a tendency to undermine FACA's fair balance requirement. In such circumstances, we believe it is appropriate to make compensation available for advisory committee members, on a uniform basis.

Senator DURENBERGER. The hearing is adjourned.

[Whereupon, at 3:25 p.m., the subcommittee was recessed, to reconvene subject to the call of the Chair.]

ADDITIONAL MATERIAL SUBMITTED FOR THE RECORD

98TH CONGRESS
1ST SESSION

S. 1641

To amend the Federal Advisory Committee Act to add a new section prohibiting scientific advisory committee membership from being based on the political affiliation of any candidate.

IN THE SENATE OF THE UNITED STATES

JULY 19 (legislative day, JULY 18), 1983

Mr. BUMPERS (for himself, Mr. JACKSON, Mr. HART, and Mr. EAGLETON) introduced the following bill; which was read twice and referred to the Committee on Governmental Affairs

---

A BILL

To amend the Federal Advisory Committee Act to add a new section prohibiting scientific advisory committee membership from being based on the political affiliation of any candidate.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be referred to as the "Nonpartisan Scientific Advisory Committee Act".

SEC. 2. The Federal Advisory Committee Act (88 Stat. 770) is amended by adding a new section 15 as follows:

"SCIENTIFIC ADVISORY COMMITTEES

"SEC. 15. (a) No selection for appointment to a scientific advisory committee may be based in whole or in part on

the political affiliation of any candidate nor shall any person employed in the executive branch of the Federal Government who has authority to take or recommend any action on such appointment make any inquiry concerning the political affiliation of such candidate.

"(b) For the purpose of this section the term 'scientific advisory committee' is defined to be an advisory committee, including any committee, board, commission, council, conference, panel, task force, or other similar group or any subcommittee thereof, the official designation of which contains any of the terms 'science', 'scientific', 'technical', 'research', or 'economic'.

"(c) If at any time after the date of enactment any person is selected for appointment or denied appointment to the membership of any scientific advisory committee in a manner prohibited by subsection (a), then the appointing authority shall declare the appointment of all the members of that scientific advisory committee to be null and void and the appointing authority shall as soon as possible appoint members to that scientific advisory committee in a manner that complies with subsection (a).

"(d) No person whose appointment is declared null and void under this section shall be required to reimburse the Federal Government for compensation otherwise lawfully received for periods of service prior to such declaration.

"(e)(1) Any person may commence a civil action against any Federal agency whose employee is alleged to have violated subsection (a) or where there is an alleged failure of an employee of such Federal agency to perform a duty under subsection (c). The United States district courts shall have jurisdiction without regard to the amount in controversy to enforce such provision.

"(2) The court in issuing any final order in any action brought pursuant to paragraph (1) may award costs of litigation including reasonable attorney fees to any party whenever the court determines such award is appropriate.

"(3) Nothing in this section shall restrict any right which any person (or class of persons) may have under any statute or common law to seek enforcement of this section or to seek any other relief.

"(f) The date of effectiveness of this section shall be the date of enactment of this section.".

II

98TH CONGRESS
1ST SESSION

S. 2127

Entitled the "Federal Advisory Committee Act Amendments of 1983".

IN THE SENATE OF THE UNITED STATES

NOVEMBER 17 (legislative day, NOVEMBER 14), 1983

Mr. NICKLES introduced the following bill; which was read twice and referred to the Committee on Governmental Affairs

---

A BILL

Entitled the "Federal Advisory Committee Act Amendments of 1983".

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SHORT TITLE

SECTION 1. This Act may be cited as the "Federal Advisory Committee Act Amendments of 1983".

ADDITIONAL POLICY CONSIDERATIONS

SEC. 101. Section 2(b) of the Federal Advisory Committee Act, as amended (5.U.S.C. App. 1), is amended as follows:

(a) In subsection (2) after the word "necessary" strike ";" and insert in lieu thereof ", and only when the informa-

tion to be obtained is not already available through another advisory committee or source within the Federal Government;".

(b) In subsection (3) after the word "established" strike ";" and insert in lieu thereof ", and when the subject matter or work of the committee has become obsolete by the passing of time or the assumption of the committee's main functions by another entity within the Federal Government; or the agency determines that the cost of operation is excessive in relation to the benefits accruing to the Federal Government.".

(c) In subsection (4) after the word "committees" strike ";" and insert in lieu thereof "and that composition of such committees should be balanced in their memberships in terms of the points of views represented and the functions to be performed;".

(d) In subsection (5) after the word "committee" strike "; and" and insert in lieu thereof "and the meetings of such committees must be open to the public except in those circumstances where a closed meeting shall be deemed proper and consistent with the Act; and".

ADDITIONAL COMPENSATION LIMITATIONS

SEC. 102. Section 7(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. App. 1) is amended by adding at the end thereof the following:

"(3)(A) COMMITTEE MEMBERS.—Unless specifically required by law, agencies shall not compensate advisory committee members for their service on an advisory committee. In the exceptional case where an agency head is unable to meet the need for technical expertise or the requirement for balanced membership solely through the appointment of non-compensated members, the agency head may contract for the services of a specific consultant who may be appointed as a member of the advisory committee. In such a case, the agency head shall follow the procedures set forth in paragraph (B) of this section.

"(B) CONSULTANTS.—Prior to hiring a consultant who shall be appointed as a member to an advisory committee, the agency head must determine that the expertise or viewpoint to be offered by the consultant is not otherwise available without cost to the agency. When an agency head hires a consultant, the compensation may not exceed the maximum rate of pay authorized by section 3109 of title 5, United States Code. Hiring of consultants shall be in accordance with applicable statutes, regulations, Executive orders, and any Government-wide administrative controls.

"(C) STAFF MEMBERS.—An agency may fix the pay of each advisory committee staff member at a rate of the General Schedule, General Management Schedule, or Senior Executive Service in which the staff member's position would

appropriately be placed (5 U.S.C. chapter 51). An agency may not fix the pay of a staff member at a rate higher than the daily equivalent of the maximum rate for GS–15, unless the agency head has determined that under the General Schedule, General Management Schedule, or Senior Executive Service classification system, the staff member's position would appropriately be placed at a grade higher than GS–15. This determination must be reviewed annually by the agency head—

"(i) in establishing rates of compensation, the agency head shall comply with applicable statutes, regulations, and Executive orders; and

"(ii) A staff member who is a Federal employee shall serve the knowledge of the designated Federal official and the approval of the employee's direct supervisor. If a non-Federal employee, the staff member shall be appointed in accordance with applicable agency procedures, following consultation with the advisory committee.

"(D) NONCOMPENSATED SERVICES.—Nothing in this section prevents an agency from accepting the noncompensated or unreimbursed services of a consultant or staff member of an advisory committee.".

ADDITIONAL RESPONSIBILITIES OF AGENCY HEADS AND ADVISORY COMMITTEE MANAGEMENT OFFICERS

SEC. 103. Section 8 of the Federal Advisory Committee Act, as amended (5 U.S.C. App. 1) is amended as follows:

(a) At the end of paragraph (a) add—

"(1) The agency head shall—

"(A) file charter as specified in section 9;

"(B) issue agency regulations or guidelines as may be necessary to operate and oversee the advisory committee;

"(C) file required documents;

"(D) publish required notices in the Federal Register;

"(E) designate a Committee Management Officer for the agency;

"(F) appoint a Designated Federal Official for each advisory committee;

"(G) ensure the opportunity for public participation as required;

"(H) ensure that detailed minutes are kept of each advisory committee meeting;

"(I) ensure that any rates of pay are justified;

"(J) submit required reports; and

"(K) terminate the advisory committee when appropriate.

"(2) The agency head should—

"(A) not later than the initial meeting of an advisory committee, submit to committee members, committee staff, consultants, and appropriate agency management personnel a written statement of the purpose, objectives, and expected accomplishments for the committee;

"(B) solicit in writing or in a formal meeting at least annually the views of the committee members on the effectiveness, activities, and management of the committee, including recommendations for improvement. Comments received should be reviewed by the agency head or senior policy official responsible for the committee to determine whether improvements corrective action is warranted. Copies of such recommendations should be retained until the committee is terminated or renewed;

"(C) inform key management personnel of the agency whose interests are affected by the committee of committee meetings, provide them with copies of committee or subcommittee reports, and allow them to assist the designated Federal

official or employee in the establishment of the agenda;

"(D) limit membership on advisory committees to twenty-five members for committees with an agencywide mission and twelve members for committees with a more narrowly defined function or specialized area of interest. An agency head may authorize additional members for a committee when the agency head determines that such additional members are necessary to the function of the committee or to achieve balanced membership;

"(E) periodically, but not less than annually, review the level of agency staff support dedicated to advisory committees to ensure that expenditures are justified in consideration of committee activity and the benefits accruing to the Government;

"(F) monitor the attendance and participation of advisory committee members and consider replacing any member who has missed a substantial number of scheduled committee meetings; and

"(G) establish meeting dates and distribute agendas and other meeting materials well in advance.".

(b) In paragraph (b) strike the words "The head of each agency which has an advisory committee shall designate an Advisory Committee Management Officer who shall—" and insert in lieu thereof "The Committee Management Officer for the agency shall—"and at the end of paragraph (b), subsection (3) add the following new subsection:

"(4) maintain in a single location a complete set for the charters and membership lists of each of the agency's advisory committees;

"(5) maintain information on the nature, functions, and operations of the agency's advisory committees; and

"(6) provide information on how to obtain copies of minutes of meetings and reports of each of the agency's advisory committees.".

FURTHER ESTABLISHMENT AND PUBLICATION REQUIREMENTS

SEC. 104. Section 9 of the Federal Advisory Committee Act as amended (5 U.S.C. App. 1) is amended as follows:

"(a) At the end of paragraph (c) add the following new paragraph:

"(d) Advisory committees may only be established in accordance with the following procedures:

38-778 O - 84 - 12

"(1) prepare a proposed charter for the committee which includes the information listed in paragraph (C) below; and

"(2) submit an original and one copy of a letter to the Administrator proposing to establish or use, reestablish, or renew, an advisory committee. The letter shall include the following information:

"(A) an explanation of why the committee is essential to the conduct of agency business and in the public interest;

"(B) an explanation of why the committee's functions cannot be performed by the agency, another existing advisory committee, or other means such as a public hearing; and

"(C) a description of the agency's plan to attain balanced membership. For purposes of obtaining balance, agencies shall consider for membership a cross-section of interested persons and groups with demonstrated professional or personal qualifications or experience to contribute to the functions and tasks to be performed. This shall not be construed to limit the participation of any individual where such participation is necessary to obtain divergent points of view that are relevent to the business of the advisory committee. The

letter shall be accompanied by two copies of the proposed charter.

"(3)(A) CONSULTATION AND CHARTERING.—Unless a particular subcommittee(s) is specifically provided for and described in the charter of the parent advisory committee, the requirements of section 101–6.1007(a) (1), (2) shall apply to any subcommittee which—

"(1) has functions other than, or different from, the parent committee;

"(2) has functions independent of the parent committee, for example, making recommendations directly to a Federal official rather than to and for consideration by the parent committee; or

"(3) has members other than members of the parent committee.

"(B) SUBCOMMITTEE MEETINGS.—A meeting of a subcommittee shall be subject to the provisions of the Act to the same extent as a meeting of a parent committee:

"(1) the Administrator will review the proposal and provide the agency head with concurrence, nonconcurrence, or status report;

"(2) upon receipt of the Administrator's final determination, the agency head shall notify the Administrator in writing that either—

"(A) the advisory committee is being established; the filing of the advisory committee charter as specified in paragraph (e) below shall be considered appropriate written notification in this instance. The agency head shall then comply with the provisions of paragraph (a) in section 8 of the Act for an established advisory committee; or

"(B) the advisory committee is not being established. In this instance, the agency head shall also advise the Administrator if the agency head intends to take any further action with respect to the proposed advisory committee.

"(e) Charter filing requirements are as follows:

"(1) ADVISORY COMMITTEE ESTABLISHED, USED, REESTABLISHED, OR RENEWED BY AN AGENCY.—The agency head shall file—

"(A) the charter with the standing committees of the Senate and of the House of Representatives having legislative jurisdiction of the agency;

"(B) a copy with the Secretariat; and

"(C) a copy with the Library of Congress, Exchange and Gift Division, Federal Documents Section, Federal Advisory Committee desk, Washington, District of Columbia 20540.

"(2) ADVISORY COMMITTEE SPECIFICALLY DIRECTED BY LAW OR AUTHORIZED BY LAW.—Procedures are the same as in paragraph (1) of this section.

"(3) PRESIDENTIAL ADVISORY COMMITTEE.—When either the President or the Congress establishes an advisory committee which advises the President, the responsible agency head or, in the case of an independent Presidential advisory committee, the President's designee shall file—

"(A) the charter with the Secretariat;

"(B) a copy with the Library of Congress; and

"(C) if specifically directed by law, a copy with the standing committees of the Senate and the House of Representatives having legislative jurisdiction of the agency or of the independent Presidential advisory committee.

"(f) The following information must be published:

"(1)(A) COMMITTEE ESTABLISHMENT, REESTABLISHMENT, OR RENEWAL.—A notice in the Federal

Register is required when any advisory committee, except a committee directed by law or established by the President, is established, reestablished, or renewed. Upon receiving notification of the completed review and concurrence in the committee from the Administrator, the agency head shall publish a notice in the Federal Register that the committee is being established, reestablished, or renewed, and for a new committee such notice shall also include a statement describing the nature and purpose of the committee and an affirmation that it is necessary and in the public interest.

"(B) Establishment and reestablishment notices shall appear before the committee charter is filed.

"(2) COMMITTEE MEETINGS.—(A) The agency head or the chairperson of an independent Presidential advisory committee shall publish prior to an advisory committee meeting a notice in the Federal Register which includes—

"(i) the exact name of the advisory committee as chartered;

"(ii) the time, date, place, and purpose of the meeting;

"(iii) a summary of the agenda; and

"(iv) a statement whether all or part of the meeting is open to the public or closed, and if

closed, the reasons why, citing the specific exemptions of section 552b of title 5, United States Code, as the basis for closure.".

ADDITIONAL COMMITTEE PROCEDURES AND FEDERAL OFFICIAL'S DUTIES

SEC. 105. Section 10 of the Federal Advisory Committee Act is amended (5 U.S.C. App. 1) is amended as follows:

(a) At the end of paragraph (a) subsection (3) add the following: "The agency head, or the chairperson of an independent Presidential advisory committee, shall ensure that—

"(A) each advisory committee meeting is held at a reasonable time and in a place reasonably accessible to the public;

"(B) the meeting room size is sufficient to accommodate advisory committee members, committee or agency staff, and interested members of the public;

"(C) any member of the public is permitted to file a written statement with the advisory committee; and

"(D) any member of the public may speak at the advisory committee meeting if the agency's regulations or guidelines so permit.".

(b) In paragraph (d) after the second time the word "determination" appears, insert the following: "The procedure which must be followed to close an advisory committee meeting is—

"(1) to close all or part of a meeting, a duly authorized official acting on behalf of the committee shall submit a request to the agency head, or in the case of an independent Presidential advisory committee, the Administrator or his delegate, citing the specific provisions of section 552b of title 5, United States Code, which justify the closure. The request shall provide the agency head (or Administrator) sufficient time to make a determination prior to publication of the required meeting notice;

"(2) if the agency head, or in the case of an independent Presidential advisory committee, the Administrator or the person to whom such authority is delegated by the agency head or Administrator, determines that the request is consistent with applicable law, he or she shall issue a determination that all or part of the meeting may be closed; and

"(3) the agency head, or the chairperson of an independent Presidential advisory committee, shall—

"(A) make a copy of the determination available to the public upon request; and

"(B) publish the meeting notice in the Federal Register, including the reasons why all or part of the meeting is closed, citing the specified ex-

emptions used from the Government in the Sunshine Act.".

(c) Strike all of paragraph (e) and insert in lieu thereof the following:

"(e) The agency head, or in the case of an independent Presidential advisory committee, the Administrator, shall designate a full-time Federal employee to be the designated Federal official for the advisory committee who—

"(1) must attend the meetings;

"(2) shall adjourn the meetings when he or she determines that adjournment is in the public interest; and

"(3) for agency-established advisory committees—

"(A) approve or call the meeting of the advisory committee;

"(B) approve the agenda; and

"(C) chair the meeting when so determined by the agency head; and

"(4) no advisory committee shall conduct any meeting in the absence of the designated Federal official.".

(d) At the end of paragraph (f) add the following new paragraph:

"(g) The chairperson shall comply with the Act and this regulation shall—

"(1) determine with the Administrator or his or her delegate the role of the designated Federal official;

"(2) designate a committee management officer for the committee; and

"(3) fulfill the responsibilities of an agency head as specified in paragraph (a)(1) subsections (A), (C), (D), (G), (H), and (J) of section 8 of this Act.".

ADDITIONAL REPORTS

SEC. 106. At the end of section 12 of the Federal Advisory Committee Act as amended (5 U.S.C. App. 1) add the following new paragraph:

"(c) The Administrator or designee shall periodically issue instructions to agencies regarding reporting requirements and procedures. Included in those instructions shall be a requirement that each agency file a report on a fiscal year basis providing requested program, financial, and membership information to the Secretariat for preparing program recommendations and status reports on advisory committee matters, and for assisting the President in preparing and submitting a fiscal year report to the Congress. The membership list for each advisory committee shall be updated quarterly with notification furnished to GSA of all new vacancies and appointments during the period.".

ADDITIONAL TERMINATION AND RENEWAL PROCEDURES

SEC. 107. Section 14 of the Federal Advisory Committee Act as amended (5 U.S.C. App. 1) is amended as follows:

(a) In paragraph (a) at the end of subsection (2)(B) strike the "." and insert in lieu thereof the following: "; or (c) the President or agency head terminates it before that time.".

(b) At the end of paragraph (c) add the following new paragraph:

"(d)(1) Advisory committees established by the President may be renewed by appropriate action of the President and the filing of a new charter.

"(2) Advisory committees specifically directed by law—

"(A) which terminate under the provisions of section 14 of the Act may be reestablished by an agency head, provided that the agency complies with the provisions of paragraph (a)(3) in section 9 of this Act.

"(B) whose duration extends beyond two years shall require a new charter to be filed every two years after the date of enactment of the law establishing the committee. If a new charter is not filed, the committee is not terminated, but may not meet or take any action.

"(3) Advisory committees authorized by law or established or used by an agency: At least thirty but not more than sixty days before the committee terminates, an agency

head who intends to renew a committee shall comply with the provisions of paragraph (a)(3) in section 9 of this Act.".

ADMINISTRATIVE CONFERENCE OF THE UNITED STATES
2120 L STREET, N.W., SUITE 500
WASHINGTON, D.C. 20037
(202) 254-7020

January 26, 1984

OFFICE OF
THE CHAIRMAN

Honorable William V. Roth, Jr.
Chairman
Committee on Governmental Affairs
United States Senate
Washington, D.C. 20510

Dear Mr. Chairman:

This is in response to your letter of December 21, requesting the comments of this Office on S. 2127, the Federal Advisory Committee Act Amendments of 1983.

S. 2127 would extensively revise the Federal Advisory Committee Act (FACA), generally in the direction of increased restrictions and administrative controls on the establishment and use of advisory committees by Federal agencies.

Section 101 would amend the Congressional findings and policy statement in section 2 of FACA to place additional emphasis on avoiding establishment of new advisory committees when the information sought is available elsewhere in the Government, on terminating obsolete committees, and on securing better balance in committee membership and openness in committee meetings.

Section 102 would place restrictions on agency compensation of committee members and committee staff. Section 103 would place additional responsibilities in connection with the establishment and operation of advisory committees. Section 104 would prescribe in detail the procedure for establishing advisory committees, filing committee charters, and publication of notices and other information relating to advisory committees. Section 105 would amend section 10 of the Act to prescribe procedures for committee meetings, including the procedure for closing all or part of a committee meeting. Sections 106 and 107 would add provisions to the Act relating to reporting requirements and procedures for termination and renewal of advisory committees.

The provisions of the bill do not appear to effect major changes in the Act, but seem primarily intended to codify the present regulations of the General Services Administration, issued in April 1983, which govern agency administration of the Act. While we do not take issue with the substance of particular provisions of the bill, it seems to us that the level of detail contained in the bill is far more suited for agency regulations than for legislation. The effect of enacting these provisions into law is likely to be an undesirable lack of flexibility in the administration of FACA.

One subject which is not addressed in S. 2127 is the definition of advisory committee. In paragraph 2 of its Recommendation No. 80-3, Interpretation and

Implementation of the Federal Advisory Committee Act, adopted in 1980, the Administrative Conference stated:

> "2. The most serious problems regarding the coverage of FACA have involved the appplicability of the Act (a) to groups convened by agencies, on an ad hoc basis, without formal organization or structure or continuing existence, to obtain views on particular matters of immediate concern to the agency, and (b) to privately established groups whose advice is 'utilized' by an agency.
>
> "(a) Uncertainty as to the applicability of FACA to one-time or occasional meetings between ad hoc groups and Government officials has tended to discourage useful contacts with the private sector. It is impractical to require such meetings to conform with the Act's requirements regarding chartering, advance notice, and structure of the committee. The Administrative Conference believes that the Act is not applicable to ad hoc, unstructured, non-continuing groups and that GSA's guidelines should make this clear. Coverage of such groups would not further the purposes of the Act.
>
> "(b) The Conference believes that the definition of 'advisory committee' is limited to committees either established by Government action or affirmatively supported and 'utilized' by the Government through institutional arrangements which amount to the adoption of the group as a preferred source of advice. GSA's guidelines should make this clear.
>
> "(c) Agencies should be sensitive to the desirability of making available to the public advice or information obtained from private or ad hoc groups not covered by FACA when the agency is considering action based on such advice or information."

We are pleased that the present GSA regulations express general agreement with the definition of advisory committee in paragraph 2(b) of the Conference recommendation. While the regulation, 41 C.F.R. §§ 101-6.1003, 101-6.1004, provides valuable guidance with respect to the definitional problem, difficulties in resolving questions of coverage are not likely to disappear entirely. See Wegman, The Utilization and Management of Federal Advisory Committees, Charles F. Kettering Foundation, 164-179 (1983). We believe that in any general revision of FACA Congress should consider how the definition of advisory committee might be narrowed and clarified along the lines recommended by the Conference.

Sincerely yours,

Loren A. Smith

Loren A. Smith
Chairman

Center for Auto Safety

2001 S Street N.W., Suite 410
Washington, D.C. 20009
(202) 328-7700

June 11, 1984

Senator John Danforth, Chairman
Subcommittee on Information Management
and Regulatory Affairs
Committee on Governmental Affairs
346 Dirksen Senate Office Building
Washington, DC 20510

Dear Senator Danforth:

The Select Committee on the Federal Advisory Committee Act (FACA) established by the Federal Bar Association (FBA) will testify before you on June 12 on recommendations for administrative and legislative changes to the Federal Advisory Committee Act (FACA). I am recorded as a member of the Select Committee in the advance written submission of Select Committee testimony.

I would like to dissent vigorously from the testimony presented as representative of the Select Committee's position on the FACA. The Center for Auto Safety, and affiliated public interest/consumer advocacy organizations, does not endorse any of the major positions taken by the Select Committee. We particularly stress our strongest opposition to the recommendation of automatic exemption of groups meeting only "a few times" and, especially, of the legislative exemption of state and local governments and their voluntary interest groups. With regard to this last piece of advice from the Select Committee, we cannot imagine any maneuver in statute that will more easily begin the erosion of the protections afforded the general public against the preferential access of powerful special-interest groups to the agency decisionmaking process than this recommended amendment. The special dispensation to SLIGs in the law to consult freely without the sunshine of the FACA will initiate an unending petition by other special interest groups for unfettered access to agency deliberations. The argument by the FBA Select Committee based on the ACIR relationship stands the FACA on its head. And, lastly, the manipulation and excessive control of agency policy by SLIGs is a long story in a number of agencies, not least of which is the extent to which the Federal Highway Administration has been held in thrall by the American Association of State Highway and Transportation Officials for many years. Until the Center for Auto Safety won a pivotal decision at the appellate level on the utilization of this interest group by the Federal Highway Administration, 23 CFR Pt. 625, listing the standards for Federal assistance in the highway program, read like a publication list from the American Association of State Highway and Transportation Officials.

Respectfully,

G.A. Donaldson, Ph.D.
Associate Director

cc: J. Clay Smith, Jr.

CONSUMER PRODUCT SAFETY COMMISSION
WASHINGTON, D.C. 20207

14 FEB 1984

The Honorable William V. Roth, Jr.
Chairman
Committee on Governmental Affairs
United States Senate
Washington, D.C. 20510

Dear Mr. Chairman:

This is in response to your letter of December 21, 1983, requesting the views of the Consumer Product Safety Commission on S. 2127, a bill to amend the Federal Advisory Committee Act. The bill would articulate in greater detail the advisory committee responsibilities of agency heads, agency committee management officers, and federal employees designated to coordinate activities of specific committees. The bill specifies the information to be supplied to the General Services Administration (GSA) during the life of committees. The public would be authorized to submit written comments to committees, and stricter procedures, analagous to the Government in the Sunshine Act, would be required before a committee meeting could be closed to the public. The Commission has no objections to the above amendments and does not believe that they would impose any significant paperwork or regulatory burdens on its limited usage of advisory committees. The Commission has only two committees subject to the Federal Advisory Committee Act, and one of these is scheduled to terminate one year from now.

We would be opposed to other sections of the bill, however. Section 102 would amend section 7(d) of the Act to flatly prohibit compensation of committee members. The Commission's opposition was set forth in a June 30, 1983 letter, copy enclosed, from our General Counsel to the National Archives and Records Service. The need for authority to compensate committee members is also shown by the Commission's Chronic Hazard Advisory Panels, as provided in 15 U.S.C. 2077. Although these panels are not subject to the Federal Advisory Committee Act, they are similar to other committees which are subject to the Act, and which would be affected by the proposed amendments. The Chronic Hazard panels are composed of distinguished scientists who must personally sift and analyze large quantities of complex and controversial data in order to make their recommendations. The work cannot be delegated to paid staff or a single paid consultant to the panel, as would be permitted by S. 2127. It would not be possible to obtain a balanced panel, or perhaps any panel at all, if the members could not be compensated. We believe that S. 2127's prohibition against compensation could cripple many similar technical advisory committees subject to the Federal Advisory Committee Act.

Section 104 of the bill would add a section 9(f)(1)(A) which would, by its terms, give the Administrator of GSA a veto over the creation of advisory committees. This could be inconsistent with both existing law and proposed section 9(d)(3)(B)(2)(A), and would appear to abridge the policy-making authority of an independent regulatory commission, such as the Consumer Product Safety Commission.

Section 107 of the bill would add language to section 14(a)(2)(B) whose literal, if unintended, effect would be to give the President authority to terminate a statutorily established committee. This could be corrected by adding the word "respectively" after "agency head" in the proposed amendment to section 14(a)(2)(B).

Thank you for giving me the opportunity to comment on the bill. Please feel free to contact me if you have any further questions.

Sincerely,

ORIGINAL
SIGNED BY
NANCY HARVEY STEORTS

Nancy Harvey Steorts
Chairman

Enclosure

20 JUN 1983

Special Assistant to the Archivist (NX)
National Archives and Records Service
Washington, D.C. 20408

Attention: FPMR Comments.

Dear Sir/Madam:

We are pleased to have an opportunity to comment on the regulations promulgated by the General Services Administration (GSA) on federal advisory committee management. At the outset, we agree that the use of volunteers in the context of membership on Federal advisory committees is a most worthwhile objective and that such use should be pursued as a means of controlling the costs of administering such committees. It is in that light that we reviewed GSA's interim rule on Federal Advisory Committee Management--41 CFR Part 101-6--published in the Federal Register on April 28, 1983. Our comments follow.

We note that § 5(b)(2) of the Federal Advisory Committee Act (FACA) requires the membership of such advisory committees "to be fairly balanced in terms of the points of view represented . . . ." We question whether such a balance of points of view can be attained under § 101-6.1033 of the interim rule that proscribes compensating advisory committee members except in the unusual case where an agency is unable to obtain a balanced membership--mandated by § 5(b)(2) of the FACA--that also comprises members with the necessary technical expertise.

We also note that § 7(d) of the FACA provides for the establishment of "uniform fair rates of pay for comparable services of members, staffs, and consultants of advisory committees in a manner which gives appropriate recognition to the responsibilities and qualifications required and other relevant factors." In this respect, § 101-6.1033 of the interim rule appears to conflict with § 7(d) of the FACA because the former

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contemplates, even requires, that most committee members shall serve without compensation for any number of unspecified reasons--salary and expenses paid by one's employer, member independently wealthy or can expense or deduct the cost of serving, etc.--while other members may receive consulting fees of as much as $245 a day, plus expenses, because they declined to serve without pay.

We suggest that not complying with §§ 5(b)(2) and 7(d) of the FACA runs the risk of unduly complicating the recruitment, selection, and administration of advisory committees. Thus, to avoid even the possibility of losing the services of faculty and research personnel and representatives of public interest and consumer groups on our advisory committees; of skewing advisory committee membership to favor the views of those who are able to participate at their own expense; and of requiring additional staff resources to locate prospective members who will serve without pay, we recommend that § 101-6.1033 be amended to provide that each agency head shall have the authority and discretion to determine whether to compensate committee members and that such determinations shall be made on a committee-by-committee basis and not on a member-by-member basis.

We appreciate this opportunity to comment on GSA's interim rule.

Sincerely yours,

S/

Martin Howard Katz
General Counsel

UNITED STATES DEPARTMENT OF EDUCATION
THE SECRETARY

JUL 16 1984

The Honorable William V. Roth, Jr.
Chairman, Committee on Government Affairs
United States Senate
Washington, D.C. 20510

Dear Mr. Chairman: Bill,

Thank you for the opportunity to comment on S. 2127, a bill entitled the "Federal Advisory Committee Act Amendments of 1983."

The Department of Education recommends against enactment of S. 2127. Generally, this proposed bill would duplicate the General Services Administration (GSA) Federal Advisory Committee Management Interim Rule, published April 28, 1983. We believe that the rulemaking process, which by its nature is more easily adapted to changing policies and to the individual objectives of a variety of agencies, is a more effective means of implementing the Federal Advisory Committee Act (FACA). Furthermore, the GSA Interim Rule is still under review and will be revised substantially before final publication. Our objections to specific provisions of S. 2127 are set out below.

Section 102 would amend Section 7(d) of FACA by adding new paragraphs (3)(A) through (3)(D). We object strongly to paragraph (3)(A) which would permit the compensation of committee members only in exceptional circumstances. Compensation of members should be the prerogative of the agency head who will make a decision on a case-by-case basis taking into consideration the importance of a committee, the magnitude of its functions, and the particular expertise of its members.

Sections 103, 104, 105, and 107 would amend FACA by incorporating portions of the GSA Interim Rule. We reiterate that these provisions are more appropriate to the rulemaking process than to the statutory process. We are particularly concerned about limiting the number of members serving on a committee. The number of members should be determined by a committee's objectives and structured responsibilities.

We are also concerned about section 105(d), although it is not clear whether this subsection would apply to all committee chairmen or only chairmen of independent Presidential committees. If the former, then we oppose the provisions of the proposed subsection, which pertain to the responsibilities of a committee chairman. Such chairmen are usually from the private sector and perform committee duties on an intermittent basis. The duties specified in this subsection are best handled by a full-time Federal employee and would constitute an unnecessary burden on chairmen.

Section 106 would amend FACA to require updated quarterly membership lists for GSA. This requirement would create a duplicative and unnecessary paperwork burden on each agency. Moreover, the information could be outdated within days of being provided to GSA due to turnover in membership. This Department maintains membership lists on a current basis and responds quickly to inquiries about membership which, in our experience, tend to be specific to one committee and not generalized to the entire membership of all of an agency's committees.

The Office of Management and Budget has advised that, from the standpoint of the Administration's program, there is no objection to the submission of this report to the Congress.

Sincerely,

Ted

T. H. Bell

United States Department of State

Washington, D.C. 20520

JUN 25 1984

Dear Mr. Chairman:

We have carefully reviewed S.2127, entitled the "Federal Advisory Committee Act Amendments of 1983," as you requested in a letter to Secretary Shultz.

The proposed amendments in large part appear to have been published previously in the Federal Register, Part V, of April 28, 1983, by the General Services Administration as interim regulations on "Federal Advisory Committee Management." It is our considered opinion that these interim regulations do not enhance the present Federal Advisory Committee Act, as amended (5 U.S.C. App.1). Therefore, we cannot endorse S.2127.

The State Department's experience in implementing the Advisory Committee Act has been positive. The intent of the legislation has been clear and its benefits highly appreciated by this Department. The advisory committees have provided us with a breadth of viewpoints and a depth of technical expertise not otherwise easily available or affordable.

Initially under OMB and subsequently under GSA administration, the Act has been carried out under general guidelines which allowed each agency to adapt its procedures to widely varying needs dictated by the substantive focus of each committee and agency objectives in sponsoring these groups. The guidelines were also flexible enough to accommodate Presidential and Congressionally mandated Advisory Committees.

While some of the language in S.2127 merely restates provisions already in the Act, the added sections, in our view, appear to seek more restrictive guidelines that would impair rather than improve operation of the Act. These added sections have been the subject of debate for the past two years as successive drafts of GSA's proposed interim regulations were circulated to the agencies for comment. Given GSA's authority to establish administratively advisory committee management guidelines, the State Department believes this legislation is unnecessary. Codifying the interim rule making will not increase the effectiveness but will make amendments more difficult to achieve.

The Honorable
William V. Roth, Jr., Chairman,
Committee on Governmental Affairs,
United States Senate.

The State Department has opposed specific provisions of the interim rule as being unnecessary and costly. For example, the requirement that membership lists be updated quarterly requires additional staff time and paperwork disproportionate to any expected utility. We estimate that this quarterly report will cost $4,000 - 6,000 a year in pro-rated staff salaries to implement. Our experience with Congressional and public inquiries about committee membership suggests that they are directed toward a specific committee or agency. They are not general or frequent enough to justify the added expense of a large government-wide central file. Moreover, these lists are perishable (resignations, transfers, etc.) so that even a quarterly report is soon out of date. Individual agencies, assisted by their own new automated office machines, are better suited to handle membership inquiries promptly and accurately.

While current responsibilities of agency heads under the current Act are necessary and useful, the new discretionary sections contained in S.2127 are objectionable because they are not cost-effective:

-- A well-written committee charter is available to committee members to provide a statement of purpose, objectives and expected accomplishments thereby making a separate statement redundant.

-- Since a committee's size is determined by its purpose and objectives, setting arbitrary suggested ceilings is not helpful.

-- Periodic reviews of committee expenditures are already required under current reporting procedures.

We believe that provisions covering the day-to-day operating details of Advisory Committee work are unsuitable for interim regulations and will reduce efficiency if enacted as statutory law. The more flexible terms of the present Act are working well for the Department.

The State Department is only marginally affected by the new prohibitions on compensation for public members of Advisory Committees because traditionally it has not normally made such payments. Nonetheless, we believe that compensation should be an agency prerogative. Agency budget restrictions work effectively to restrain committee expenditures. We are not persuaded that hiring consultants is a feasible and less expensive alternative to present practices.

In contrast to the larger Federal agencies, the State Department's Advisory Committee program is managed with part-time staff both at the committee level and in central management. We must constantly balance the use of staff resources as between full-time substantive foreign policy responsibilities

and part-time committee management. We are concerned that adding non-essential administrative detail to the operation of the Advisory Committees will adversely affect the program in terms of cost, efficiency, and flexibility.

For these reasons, we recommend that the Senate Committee on Governmental Affairs not endorse S.2127.

The Office of Management and Budget has advised that, from the standpoint of the Administration's program, there is no objection to the submission of these views to the Congress.

Sincerely,

W. Tapley Bennett, Jr.
Assistant Secretary
Legislative and Intergovernmental Affairs

DEPARTMENT OF THE TREASURY
OFFICE OF THE GENERAL COUNSEL
WASHINGTON, D.C. 20220

JUN 26 1984

Dear Mr. Chairman:

This letter is in response to your request for the views of this Department on S. 2127, a bill entitled the "Federal Advisory Committee Act Amendments of 1983."

Included within S. 2127 are amendments to the Federal Advisory Committee Act which would further restrict hiring consultants, creating committees, and holding closed meetings.

We question whether it is necessary or desirable to set forth in the statute in such detail, material that encompasses administrative and management procedures as well as policies. We believe that such matters are more appropriately addressed through the regulatory process and that legislating such requirements will not significantly increase their effectiveness. Moreover, a regulatory approach would facilitate needed flexibility which would be difficult to achieve under the statutory approach contained in the bill. For these reasons, we oppose enactment of S. 2127.

The Office of Management and Budget has advised that there is no objection from the standpoint of the Administration's program to the submission of this report to your Committee.

Sincerely yours,

Margery Waxman

Deputy General Counsel

The Honorable
William V. Roth, Jr.
Committee on Governmental Affairs
United States Senate
Washington, D.C. 20510

NATIONAL ACADEMY OF SCIENCES

2101 CONSTITUTION AVENUE WASHINGTON, D.C. 20418

OFFICE OF THE PRESIDENT

July 16, 1984

The Honorable John C. Danforth
Chairman
Subcommittee on Information
Management and Regulatory Affairs
Committee on Governmental Affairs
United States Senate
Washington, D. C. 20510

Dear Senator Danforth:

On June 21, your Subcommittee held hearings on amendments to the Federal Advisory Committee Act, including consideration of S. 1641, a bill entitled "The Nonpartisan Scientific Advisory Act." Since the objectives sought by S. 1641 are of considerable interest to the scientific community, and in light of the Academy's experience with the creation and selection of members on scientific advisory bodies, I am taking this opportunity to comment on the proposed measure. With your concurrence, I respectfully request that these views be included in your hearings record.

Your Subcommittee is to be commended for its efforts to insure the integrity of the committee selection process. Public scientific advisory groups are created to assure that Federal officials have access to objective and competent scientific advice. Thus, we strongly endorse the principle that criteria for appointments to public scientific advisory bodies should be the professional and scientific competence of prospective candidates and such criteria should not include political affiliation or special interest representation.

Even if an appointee to a scientific advisory group has an outstanding record of experience and scientific credentials, the mere fact of a political clearance immediately raises questions of the individual's objectivity, thus bringing into question the credibility of an advisory group's deliberations. Fortunately, appointments to peer review panels such as those at the

National Institutes of Health and the National Science Foundation traditionally have been shielded from the political clearance process, and any erosion of this strict principle should be resisted.

Quite apart from the prohibition against political clearances, other criteria, such as sectoral or institutional representation, also should not apply to the selection process for membership on scientific and technical advisory committees. In this connection, the sponsors of S. 1641 in introducing this measure noted that the President vetoed a bill last year, which would have required membership on EPA's Science Advisory Board to be balanced in terms of the points of view represented, by including representation of the states, industry, labor, academia, consumers, and the general public. The President by his veto recognized that scientific and professional competence should be the principal selection criteria for appointments to scientific advisory bodies and not political, institutional or sectional considerations.

In further deliberations on the provisions of S. 1641, you may wish to consider broadening the relevant provision, in keeping with the above principles, to include an affirmative statement that membership on scientific and technical advisory panels be based upon scientific competence and professional training and experience. This approach is consistent with statutory provisions on criteria for appointments to many legislatively established advisory bodies, e.g., the several National Advisory Councils of the Public Health Service and the National Institutes of Health, the Council on Environmental Quality, the Council of Economic Advisors, the National Science Board, etc.

Statutory criteria for excellence and competence would strengthen the responsibility of Federal officials for assuring nonpolitical selection and appointment of scientific advisory bodies. Such a provision would thus appear to provide a necessary augmentation to the prohibitions against political consideration proposed in Section 15. It should be noted in this regard that the political prohibition set forth in Section 15 of S. 1641 would not in itself assure that scientifically and

professionally competent individuals are chosen. The addition of this affirmative mandate as the paramount guideline in the appointment process also should aid in reducing the prospects of extended litigation or dismantling of an existing advisory group, implicit in the enforcement provisions of Section 15(c) and (e). These last resort provisions, if invoked, are measures that have the potential for substantial delays in the provision of timely scientific advice that is often critical in the program or regulatory decision process.

Understandably, there are many Federal advisory bodies that deliberate on broader public policy issues of a political nature involving scientific and technical considerations. Often the inclusion and balancing of special interest representation in the deliberations of such bodies becomes an essential element in the political process of decision-making. Thus, the statutory application of the proposed legislation must be drawn with care, reflecting the nature and concerns of the deliberative body in question.

In summary, the introduction of partisan, sectional or special interest influences, unrelated to scientific and professional consideration, into the selection process for membership on scientific advisory bodies erodes the quality of advice given to government agencies, as well as the confidence of the public in the advisory process. Your Subcommittee's efforts to maintain strict principles of appointment are highly commendable and should be pursued.

Yours sincerely,

Frank Press

Frank Press
President

National Aeronautics and
Space Administration

Washington, D.C.
20546

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JUN 26 1984

Honorable William V. Roth, Jr.
Chairman
Committee on Governmental Affairs
United States Senate
Washington, DC 20510

Dear Mr. Chairman:

This is in further response to your request for the comments of the National Aeronautics and Space Administration on the bill S. 2127, the "Federal Advisory Committee Act Amendments of 1983."

The bill would enact into statute policy considerations for the creation of advisory committees, compensation limitations for committee members and staff, responsibilities of agency heads and committee management officers, further requirements for establishment of committees and publication of materials, committee procedures and officials' duties, certain reports, and termination and renewal procedures related to advisory committees. Most of these provisions would codify administrative and procedural requirements contained in the General Services Administration's (GSA's) interim rule on Federal Advisory Committee management (48 FR 19324; April 28, 1983).

NASA questions the need for statutory enactment of these administrative procedures and believes that the bill's intent is more appropriately addressed through administrative rule making.

Furthermore, we have a number of concerns about specific provisions contained in both S. 2127 as well as the GSA interim rule.

Section 101(a) of the bill, which would further restrict the establishment of new advisory committees, places an extraordinary burden on each agency to be aware of the ongoing activities of all other advisory committees in the Federal government. We believe this type of burden is unrealistic.

Section 102, which relates to additional compensation limitations, is of concern because it would allow the agency head to compensate advisory committee members only in the exceptional case where the need for technical expertise or the requirement for balanced membership could not be met through the appointment of noncompensated members. These are extremely limiting exceptions. Although NASA, basically, does not pay its advisory committee members, there are certain NASA advisory committees, which we refer to as peer review groups, whose members are compensated.

These people are highly respected scientists and members of the academic community whose contributions are essential to the NASA mission, and we believe that their compensation should be an agency prerogative.

Additionally, we are concerned about the requirements under section 102 regarding compensation of Committee staff members. At NASA, staff members of advisory committees are full-time Federal employees, and the work that they do in supporting an advisory committee is generally one task among many that they perform. Therefore, their grade is not determined by the fact that they are staff members of advisory committees, but is determined by their overall positions and other duties in the agency. To require that the agency head review, annually, their grades because of added duties as staff members of advisory committees would be creating, at least in NASA, paperwork that is entirely unnecessary.

We further note with concern that in section 105(d) the chairperson of an advisory committee, who, at most agencies, in all probability would not be a full-time government employee, is given the responsibilities of the agency head as specified in section 8(a)(1) (A), (C), (D), (G), (H), and (J) of the Federal Advisory Committee Act. We find it anomalous that under the bill a chairperson of an advisory committee would be filing the committee charter and required documents and publishing required notices in the Federal Register. These responsibilities, in our opinion, should be placed with a lower level agency employee. It is our understanding that in most agencies, it is the Committee Management Officer who attends to the details of ensuring that the advisory committees are correctly run, and therefore we recommend that such an officer be made responsible for publishing Federal Register notices, ensuring that charters are filed, and that all steps are taken to comply with the law. We do agree that certain responsibilities should remain with the agency head, such as the determination that an advisory committee is necessary in the public interest.

For these reasons, we recommend that this bill not be enacted.

The Office of Management and Budget has advised that there is no objection to the submission of this report from the standpoint of the Administration's program.

Sincerely,

John F. Murphy
Assistant Administrator
for Legislative Affairs

THE WHITE HOUSE

WASHINGTON

October 7, 1983

Dear Senator Roth:

Thank you for the opportunity to review S.1641 dealing with appointments to scientific advisory committees.

While I think I understand the intent of the bill's sponsors, I do not believe the bill, if enacted in its current form, would help improve the process or the quality of scientific advice provided to the Federal government. It may even add obstacles for a number of practical reasons.

While scientific advice should indeed be separate from politics, a totally apolitical scientist is rare, and actual separation is difficult when people are involved. There is great risk that S.1641 would encourage frequent, unproductive litigation challenging the composition of scientific advisory committees.

In addition, making all appointments to a committee null and void if any member's appointment is found in violation of Sec. 15 (a) would cause great potential disruption to the entire scientific advisory committee system.

For these reasons, I cannot support enactment of S.1641 in its current form.

Yours truly,

G A Keyworth

G. A. Keyworth
Science Advisor to the President

The Honorable William V. Roth, Jr.
United States Senate
Washington, D.C. 20510

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